

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

SMARTFLASH LLC and )  
SMARTFLASH TECHNOLOGIES ) DOCKET NO. 6:13cv447  
LIMITED )

-vs- )

) Tyler, Texas  
) 9:06 a.m.  
APPLE, INC. ) January 26, 2015

TRANSCRIPT OF PRETRIAL CONFERENCE,  
BEFORE THE HONORABLE K. NICOLE MITCHELL,  
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S

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25 produced by a Computer.

1 P R O C E E D I N G S

2 THE COURT: Good morning.

3 Please be seated.

4 Ms. Hardwick, if you will call the case.

5 THE CLERK: Yes, Your Honor.

6 Court calls Civil Action 6:13cv447, Smartflash LLC  
7 v. Apple Inc.

8 THE COURT: Announcements.

9 MR. CALDWELL: Good morning, Your Honor. Brad  
10 Caldwell on behalf of Smartflash. And today you are going to  
11 hear from Jason Cassady, John Summers, Daniel Pearson, Chris  
12 Stewart; less likely you may hear from Claire Henry or Johnny  
13 Ward when he shows up.

14 Plaintiff is ready to proceed, Your Honor.

15 THE COURT: All right. Good morning.

16 MR. POST: Good morning, Your Honor, how are you?  
17 Eric Albritton for Apple. Jim Batchelder, Kevin Post, Josef  
18 Schenker, Ching-Lee Fukuda. And then from Apple we have got  
19 Cyndi Wheeler and David Melaugh.

20 THE COURT: Good morning.

21 MR. ALBRITTON: And we are ready to proceed, Your  
22 Honor.

23 THE COURT: All right. Well, welcome to our final  
24 pretrial conference together. I still expect that Judge  
25 Gilstrap will also set you for a final, final pretrial

1 conference so that you can get some time to interact with him  
2 before your trial in front of him. So I just want to talk  
3 about what I hope to accomplish today, and that is primarily  
4 to preadmit the exhibits.

5 Judge Gilstrap prefers that they all be preadmitted  
6 and ready to go before trial, and it is my intention to get  
7 through them.

8 I know that we have some other pending motions, and  
9 I would like to hear argument on those as well, but we are  
10 going to do exhibits first. So if we can get through those  
11 in a timely fashion, I think we will have time this afternoon  
12 to hear argument on some of the other pending motions.

13 I do have some criminal matters that I have got to  
14 take up at lunch today, so my expectation is that we will go  
15 until about 11:15 or so today, and then I have got criminal  
16 matters starting at 11:30 that I think will carry me through  
17 lunch. And we will resume about 1:00 o'clock, provided that  
18 those are finished; and then I have a clear afternoon for  
19 you-all, so...

20 With that, let's get started on the exhibits. I  
21 know that you-all have been meeting and conferring trying to  
22 narrow the disputes down; and so, hopefully, you have got  
23 something to report on that.

24 MR. PEARSON: Yes. Good morning, Your Honor.  
25 Daniel Pearson on behalf of the plaintiff.

1           The parties have come to many agreements. I have  
2 the list here. Unfortunately, I did not print multiple  
3 copies, and I apologize. I do have a list here of both  
4 exhibit numbers that do not have objections outstanding so  
5 that the parties agree on each side are preadmitted.

6           And I also have -- simultaneously with that list is  
7 a corresponding list of documents that we agree will not be  
8 preadmitted this morning because they are either covered by a  
9 motion in limine or the parties have agreed to withdraw them  
10 or might be used only for impeachment or whatever.

11           I would like to say that I believe the parties are  
12 on the same page here. With respect to the not-preadmitted  
13 list -- I am sorry. With respect to the preadmitted list,  
14 the parties agree that even if things are being preadmitted,  
15 they are still generally covered by the motions in limine  
16 such that if there is something in one of the documents that  
17 someone missed that is covered by a motion in limine or  
18 pending your ruling later today if something comes up that is  
19 preadmitted but also has a motion in limine, the parties  
20 agree that we are not going to be using those preadmitted  
21 documents to violate motions in limine, and motions in limine  
22 generally apply to what has been preadmitted.

23           THE COURT: Okay. Is that the agreement as you  
24 understand it?

25           MR. POST: We agree with that. Yes.

1 THE COURT: Very good.

2 MR. PEARSON: Now, with respect -- I am happy to  
3 pass that list up if you would like or I can -- it will take  
4 a while to read it into the record. I am happy to do that as  
5 well.

6 THE COURT: No. What I am going to have you do at  
7 the end of the day -- not today but within the next couple of  
8 days, is resubmit a joint agreed exhibit list reflecting the  
9 Court's rulings so you can just include that as part of the  
10 list, if that makes sense, what you have already agreed on  
11 that is preadmitted.

12 MR. PEARSON: Do we need to combine the PX's and  
13 the DX's into a single separate file or just keep our  
14 separate lists?

15 THE COURT: You can keep your separate lists.

16 MR. PEARSON: Okay. Thank you.

17 And then with respect to what remains that is still  
18 disputed, the parties have endeavored to categorize each of  
19 the -- each of the documents into buckets such that Your  
20 Honor can rule on each of the buckets; and whatever is in the  
21 bucket can either be in or out. That is -- you know, at  
22 times something to go in multiple buckets, we just did our  
23 best to put it with respect to the most important objection.  
24 That is what I am saying earlier about the motions in limine  
25 applying generally.

1 THE COURT: Okay. How many of those are there?

2 MR. PEARSON: I don't have an exact count.

3 Probably 10-ish per side.

4 THE COURT: Okay. What I was -- the reason I asked  
5 is I am trying to get a feel for -- I want to make sure that  
6 I give both sides equal time to be heard on their objections,  
7 and so what I would like to do is maybe -- unless you-all  
8 have agreed to another way -- maybe ping-pong and, you know,  
9 let plaintiffs take a bucket that you feel like is one you  
10 want to start with and then let the defendants do one. And  
11 that way I can as we go through the morning evenly take up  
12 both sides' objections?

13 Okay?

14 MR. PEARSON: That will be fine.

15 THE COURT: All right. Then we will me start with  
16 plaintiffs'.

17 I will say, at the end of the day -- and you-all  
18 help me save a little time for this -- I know -- I have got  
19 some just -- some thoughts from Judge Gilstrap about  
20 particular things with regard to his trials, and I want to go  
21 over those with you. I know that he will probably answer  
22 questions when he sets his pretrial conference with you, but  
23 these are things I think would be useful for you to know now.  
24 So don't let me forget those.

25 THE COURT: All right.

1 MR. CASSADY: Jason Cassady for the plaintiff, Your  
2 Honor.

3 There are a number of the buckets today I think,  
4 Your Honor, that are related to outstanding motions in  
5 limine. The Court carried, I think it was five or six with  
6 regard to the parties here today with regard to Apple and  
7 Smartflash. So I will start with one of those, and I think  
8 that probably crystallizes it pretty quickly.

9 It starts with Apple's exhibits that are  
10 the -- their own patents. They have got about 20 patents on  
11 the exhibit list related to various things. But the point  
12 is, that we still believe that their patents are prejudicial  
13 because the jury just didn't seem to really -- don't  
14 understand that you can have a patent on something and still  
15 infringe someone else's patents.

16 And these 20 patents are generally related to the --  
17 you know, to the overall accused feature. They are not  
18 saying we have a patent on FaceTime and that is something you  
19 didn't take into account. They are saying we have a patent  
20 on something called method for a network-based purchase and  
21 distribution of media.

22 Now, that is clearly intended to tell the jury we  
23 have our own patent on exactly the space or area that we are  
24 talking about; and so, therefore, they shouldn't -- you know,  
25 we don't infringe.

1           And it is really telling because the only reason  
2           that I understand they are trying to bring it in is for  
3           damages, but their own damages expert didn't take these  
4           patents into account other than just to say that they exist.

5           So Georgia-Pacific analysis requires two things,  
6           which is to take into account the unpatented features, that  
7           is one. And, two, is to take into account the contributions  
8           by the producer or the infringer to the product.

9           Well, those things can all be done without ever  
10          referring to a patent and without ever complicating the issue  
11          of trying to explain to the jury this issue of the patent  
12          does not give you the right to practice. It gives you the  
13          right to keep others from practicing.

14          And so that fundamental issue, Your Honor, I don't  
15          think I have ever had a case in East Texas that I have tried,  
16          whether on defendant or plaintiff, where patents came in from  
17          a defendant. That just hasn't happened.

18          There have been situations where they are allowed  
19          to say I am Apple and I have patents. Or, you know, we have  
20          very, very successful patents. We are very innovative.  
21          Those things are fine. That is exactly what they are trying  
22          to get at is they have contributions, but I can just show it  
23          to you.

24                 If you can pull up PX 51, please.

25                 And this one is a perfect example.

1 (Discussion between Mr. Cassady and the  
2 Technician.)

3 MR. CASSADY: DX 51, I apologize. And so zoom in  
4 on the top left. That's great.

5 So like I said here, Your Honor, this has no  
6 purpose other than to say here is an Apple witness, Max  
7 Muller, who works in the space of the accused features; and  
8 look at the title of his patent: method and system for  
9 network-based purchase and distribution of media.

10 Your Honor, nobody went through that patent and  
11 said what it applied to. Nobody said the value of that  
12 patent with regards to comparison to the value of the  
13 Smartflash patent. Nobody did any of that. This is skunk in  
14 the box, show this various title and say, see, Apple has its  
15 own patent.

16 And we have done, you know, hundreds of jury tests  
17 in cases; and over and over again we have found there is no  
18 way, no way to get a jury to understand this specific issue.  
19 They will always, always misinterpret this issue. And so  
20 that is one reason why I think most of the courts, Judge  
21 Davis, I know that Judge Clark, even the other judges I have  
22 been in front of, they just don't let this in.

23 And so they will let people like Apple say they  
24 have patents, they have patents on other features. But there  
25 is no reason for the specific patents to come in or the scope

1 of those patents to come in. So that is why in line with the  
2 motion in limine I thought a patent example of what they are  
3 trying to do is a good example as to why that is not  
4 appropriate.

5 So that is one bucket -- or one subset of the  
6 bucket, which is the patent numbers. I will let them go  
7 ahead and respond to that, and I will deal with the other  
8 side issue to that.

9 THE COURT: All right. Response.

10 MR. ALBRITTON: Just briefly, Your Honor.  
11 Mr. Batchelder is going to speak to it, but I have just had  
12 different experience than Mr. Cassady. I have certainly been  
13 in cases, where -- especially when there is a charge of  
14 willfulness, these come in. I can think of a case. It is  
15 slightly different, but it is similar. It is a case tried in  
16 front of Judge Ward. It was the Saffron case where there was  
17 a license to a prior art patent that was not used -- or a  
18 license to a patent. It was not used for prior art purposes.  
19 He let that patent in.

20 So I would just say that my experience has been  
21 different; and a categorical statement that no Judges in this  
22 district ever do that, is not my experience.

23 THE COURT: Okay.

24 MR. BATCHELDER: And I would just add, Your  
25 Honor -- good morning.

1 I would just add your Daubert ruling commented that  
2 Mr. Mills admitted that he did not apportion between the  
3 contribution of the patents and other complementary assets in  
4 the accused devices.

5 You know, as Mr. Albritton is pointing out, it is  
6 quite common in cases that when you are establishing your  
7 complementary assets, you can establish that they are  
8 inventive. And in this case, as we discussed last time, I  
9 think the Court was satisfied last time, we are never going  
10 to argue that we don't infringe because we have our own  
11 patents. Any possible confusion about that could also be  
12 dispelled with a clear jury instruction.

13 But for damages, we do need to be able to say we  
14 make our own contributions. They are inventive  
15 contributions. That has to be taken into account.

16 And as you may recall last time, I stood at the  
17 podium and I read to you maybe a dozen of examples of Dr.  
18 Becker, our damages expert, where he talks about Apple's  
19 patents.

20 So I do think it is a fair thing to do. And,  
21 frankly, depriving us of the opportunity to explain some of  
22 those patent contributions, would make it hard for us to  
23 explain to the jury in any sort of full detail to help them  
24 really appreciate what those complementary assets are.

25 THE COURT: Response?

1 MR. CASSADY: Candidly, Your Honor, the instruction  
2 won't work. I mean this is -- I mean it is pure skunk in the  
3 box. The license issue is a separate issue that we will talk  
4 about in a second. I am talking about bringing in your  
5 patents because they are just your patents. And that is what  
6 this is right here. This is not a patent that is part of a  
7 license. We will get to that in a second.

8 This is, I have got patents on the features that  
9 you are accusing, and I'm going to tell the jury about them.  
10 There is no other purpose of that other than to tell a jury  
11 you should find non-infringement because I have my own  
12 patents.

13 THE COURT: What about this argument that the  
14 defendant's expert relies on that in part of its, you know,  
15 other inventive concepts analysis?

16 MR. CASSADY: Their expert has footnotes that cites  
17 to the patents. He doesn't explain them. He doesn't walk  
18 through them. When asked about them in his deposition, he  
19 said I didn't value them. I didn't compare them to the  
20 patents in this case. I didn't figure out what this case's  
21 patent was worth versus that patent, which means he is wholly  
22 irrelevant. He didn't do anything what they are saying.

23 He cited them, yes; but he did not prepare them.  
24 He did not walk through them. He simply had some sentences  
25 in the report that make a statement or that make reference to

1 these patents, the fact that Apple has them; and the fact  
2 that Apple is innovative.

3 That is it. So there is no reason to go into those  
4 patents. Nobody here is going to contest that Apple gave  
5 things to this product that Smartflash didn't. So that is  
6 the issue. If they are going to get up and say you are not  
7 the screen, you are not FaceTime, you are not the case, you  
8 are not other pieces of software, if they are going to do  
9 that, that is normal, that is routine, and that is what their  
10 expert really goes into, and really kind of involves in.

11 And this is just simply an attempt to try and get  
12 what they know is just pure skunk in the box in front of the  
13 jury.

14 I am saying, Your Honor, my old colleague Doug  
15 Cawley -- as in older as in old ago, not that he is old, not  
16 old Doug Cawley -- he got in front of the Court -- he got in  
17 front of the Court all the time and I did, too, and this  
18 issue was pretty passionate for the two of us because we have  
19 seen too many jury studies and we just know that instructions  
20 won't work.

21 We have even gone in and tried to do corrections  
22 where we are representing the, quote, third party who is  
23 running the test; and going in and say: Do you understand  
24 that their patent is meaningless because it can't mean that  
25 they don't infringe? And the juries just don't care. They

1 don't get this issue. And I wish they did.

2 But, again, given the slight relevance that is  
3 coming in here, it just cannot overcome the just  
4 over-insurmountable issue of these patents in front of the  
5 jury.

6 THE COURT: Okay. Final word, Mr. Batchelder.

7 MR. BATCHELDER: I would just say, Your Honor, that  
8 again, as I read to you last time from the podium; and,  
9 again, I think the Court was satisfied. This was not just  
10 passing footnotes from Dr. Becker. He cited these patents in  
11 connection with his Georgia-Pacific factors again and again  
12 and again. There may be a dozen references to these  
13 patents.

14 And our witnesses should be able to say, yeah, we  
15 made this inventive contribution to the very features that  
16 they are accusing of infringement so that when it comes time  
17 to our crossing Mills on this, their damages expert, we just  
18 feel like it is absolutely fair for us to be able to point  
19 that out.

20 MR. CASSADY: Your Honor, you didn't rule on his  
21 motion in limine last time. You carried it. What they are  
22 saying is you have already ruled on this. That is not what  
23 happened. You carried the motion. You didn't rule on it.  
24 That is why we are bringing these exhibits up because like I  
25 said these are 20 exhibits that -- it is not a FaceTime

1 patent. It is a patent where they are trying to say the  
2 accused feature is their patent. That is what it is. So I  
3 gave you one example, but there is 20 of them.

4 THE COURT: All right. I'm going to exclude those  
5 exhibits.

6 What is next?

7 MR. CASSADY: Thank you, Your Honor.

8 The next issue is Apple policies. So there is a  
9 number of Apple policies sitting on the exhibit list  
10 regarding their treatment of intellectual property. Many of  
11 them relate to how Apple goes about getting their own  
12 patents, but some of them relate to Apple's generic  
13 statements about how it respects intellectual property.

14 And I believe this was argued at the last hearing,  
15 but I wasn't here, Your Honor, so I will do my best to get  
16 through this.

17 The issue is if their witnesses are going to get up  
18 and start talking about their policy, then the entire  
19 privilege MIL becomes a very large issue for us because we  
20 tried to kind of get behind this policy. We got probative  
21 objections, which was, well, see this license here that you  
22 signed, do you practice these patents? Privilege. I'm not  
23 even going to talk about that.

24 So having circumstances where they may have taken a  
25 license after a lawsuit that they actually believe they

1 infringed, would show that their policy is not necessarily  
2 that they never infringed those patents or that they don't  
3 ever say they don't infringe it and then later sign licenses.

4 But the problem is I wasn't able to get into that  
5 because they were objecting to privilege on this issue.

6 So this is kind of tied up with both this and the  
7 prior art licenses; but the issue is if I can't test your  
8 policy, then you shouldn't be able to get up and say, well,  
9 hey, we have a policy about respecting intellectual  
10 property.

11 So what is going to happen is the jury is going to  
12 hear we have a policy and there is not going to be any cross  
13 from us because our hands are tied behind our backs because  
14 they objected to privilege to all of the issues related to  
15 how well this policy is followed, what the policy is, what is  
16 behind it, what they do; those things.

17 So I just don't see how there is any reason for  
18 them to be able to say this issue to a jury or to submit  
19 these exhibits of this written policy that we weren't able to  
20 test.

21 THE COURT: Okay. Tell me again how you wanted to  
22 test it and you were stopped. They have the policy that says  
23 we respect the intellectual property rights of others. Is  
24 that it?

25 MR. CASSADY: That is the generics of it, yes.

1 THE COURT: And you wanted to ask what about that?

2 MR. CASSADY: Okay. So with regards to, for  
3 instance, Mr. Risher's testimony, when I asked him about the  
4 specific licenses they entered into, I said: Well, did you  
5 infringe those patents? Objection. Privilege. They won't  
6 answer whether they even infringe any of the patents they  
7 assign licenses to.

8 The reason that is relevant is they ultimately  
9 said -- they ultimately got sued on those patents, and they  
10 went through a lawsuit, and they told a judge they didn't  
11 infringe them. And they said we have all these great  
12 defenses, and then they sign a license.

13 And what they are going to do is get in front of  
14 the jury and say, well, yeah, there is another piece of  
15 litigation, we ended up signing a license, we don't think we  
16 infringe, we followed our policy, but; you know, we wanted to  
17 go ahead and resolve the issue so it goes away.

18 But the reality is at least some of those licenses  
19 are licenses where they believed they infringed after the  
20 license was signed, and they decided to sign a license. So  
21 that would be directly counter to their policy. If they  
22 spent two years running some inventor around in a trial and  
23 then sign a license they knew on a patent they infringe, that  
24 is exactly the thing with cross to show their policy is not  
25 what they say it is; that they just have this God-like

1 respect for intellectual property, and they will sign a  
2 license for anybody they think they infringe.

3 So we have no way to cross-examine that because  
4 they object to privilege every time we try to get near those  
5 issues.

6 THE COURT: Response.

7 MR. CALDWELL: Your Honor, if I might supplement  
8 that. Mr. Cassady and I sometimes see slightly different  
9 perspectives on -- I agree with him as to what happened but  
10 he saw it from the damages perspective.

11 Your Honor, I argued this in the context of the  
12 motion in limine last time. But what I see is, for example,  
13 with an engineer like Mr. Faruggia, virtually any question I  
14 asked him about our patents was responded with an instruction  
15 not to answer and/or him saying, oh, it is with lawyers, it  
16 is privilege. Including he would say something like I  
17 believe we don't infringe. Okay. Why? I can't tell you.  
18 It is privileged.

19 Well, have you read any part of the patent? Yes.  
20 What have you read? Can't even tell you what I have read.  
21 It is privileged.

22 So I saw it from a slightly different perspective  
23 than Mr. Cassady did, but really we both got it from the same  
24 angles because what is happening here is it seems like just  
25 as a personal anecdote vis-a-vis Apple, what we have seen is

1 an evolution where Apple now just systematically in multiple  
2 cases, it has become basically their mantra to just have  
3 their witnesses say, no, no. We have got a policy, and I  
4 gave it to our lawyers. And I feel good. We don't infringe.

5 But if you are going to use that offensively and  
6 then also have the MIL that says you can't ask anything that  
7 might elicit a privilege instruction, it puts us in an unfair  
8 position because it is sort of suggesting that there was some  
9 sort of a good throw result that concluded in  
10 non-infringement. It is like you are implying the existence  
11 of an opinion of counsel without disclosing one or the  
12 attendant waiver or allowing any investigation into it.

13 So I guess really our point is -- and I think what  
14 we agreed last time with Counsel for defendants, is we are  
15 still allowed to prove, for example, willful blindness. And  
16 so what we agreed is, I am the one who has my hands tied; but  
17 I am still allowed to ask the witness: Can you tell us any  
18 reason you believe you don't infringe? And things like that?  
19 So our hands are tied. I can't go into a lot of the  
20 questions.

21 What parts did you even read necessarily depending  
22 how they answer? It is kind of in a weird way sort of a  
23 sword/shield thing. You can't put out there, trust us, our  
24 lawyers are telling us this is okay, but not allow the things  
25 that come with that. That is really what is bugging us.

1 THE COURT: Okay. Response?

2 MR. POST: Good morning, Your Honor. Kevin Post  
3 for Apple.

4 I think this issue spans both exhibits and some  
5 deposition designations, so at face the Apple policies that  
6 are being discussed are -- they don't go quite as far as I  
7 think Mr. Caldwell is suggesting.

8 For example, one of them is a business conduct  
9 policy, a section on third-party intellectual property, and  
10 includes the following statement: If you were told or  
11 suspect that Apple may be infringing intellectual property  
12 rights between patents, copyrights, trademarks, or trade  
13 secrets owned by a third party, you should contact the legal  
14 department.

15 We think this is particularly relevant in light of  
16 some of the questions that engineers were asked about,  
17 whether they had read the patents, whether they had done  
18 these searches. And our objections to some of the deposition  
19 designations specifically relate to the fact that what has  
20 been designated is not just that question but also a  
21 cautionary instruction or reminding the witness that they  
22 can't disclose privilege communications, but they can  
23 disclose the fact that -- and this document was produced that  
24 talked about the fact that this policy exists.

25 And we think it is absolutely relevant to testimony

1 of engineers when they are asked or suggested they didn't  
2 read the patents and they have done something wrong by not  
3 doing that.

4 First of all, we think it misstates the law of  
5 willfulness and what they are required to do and duty to  
6 search is not the law, not required to do that. But at face,  
7 as I said, they have a policy in place that makes clear that  
8 is not their role. That it is someone else's role.

9 Now, I don't think that puts Smartflash in a  
10 position where they can't explore further. It is simply an  
11 explanation as to what the engineers did and why they did or  
12 didn't do anything, and nothing more. It isn't a blanket  
13 protection to them that they couldn't possibly have infringed  
14 because there is this policy. It protects everybody. It is  
15 this umbrella coverage.

16 It doesn't have that. It is simply an explanation  
17 so the jurors aren't left with a misimpression that the  
18 engineers did something wrong by not searching the patents.

19 So we think that the policies are relevant and  
20 should be preadmitted. We think they are relevant in a  
21 rebuttal context if Smartflash elects to question engineers  
22 on their own search practices.

23 And we think as to the deposition designations, we  
24 can go into more detail about those, this particular bucket  
25 if you like when we get to that phase. But we think that the

1 designation of privilege instructions has the very potential  
2 of misleading and prejudicing the jury against the engineers.  
3 We think that the -- you know, the policies are relevant for  
4 that.

5 THE COURT: Okay. Tell me a little bit more about  
6 the policies and how many of them are there, and I see the  
7 one that you highlighted, but are there -- tell me about the  
8 other ones.

9 MR. POST: So there really are -- there are really  
10 two categories, so DX-APL 305 is this business conduct policy  
11 that I mentioned.

12 THE COURT: Uh-huh.

13 MR. POST: This one talks about that statement that  
14 I made about what the engineers should do, what employees  
15 should do if they become aware. And that is the legal  
16 department, that is their role.

17 There are, I believe, six other exhibits that  
18 relate to specific witnesses, so there are offer letters and  
19 certain things that witnesses need to attest to when they  
20 join Apple, and I think that those are -- those relate to  
21 specifically what Apple's policy is about third-party IP and  
22 what people joining Apple should do to protect -- anything  
23 they learned in their prior lives, essentially, should not be  
24 used in Apple.

25 So I think that one is more related to the copying

1     allegations. I think it is still an open question as to  
2     whether or not that is even going to be part of the case. If  
3     it is not, then I don't know that is nearly as relevant. But  
4     if copying is, and for at least Mr. Faruggia, we think that  
5     policy would be relevant.

6             MR. CALDWELL: Your Honor, let me see if I can --

7             MR. ALBRITTON: Can I just briefly --

8             MR. CALDWELL: Sure.

9             MR. ALBRITTON: -- since they are tag-teaming over  
10     there, I would like to tag-team for a second.

11            THE COURT: No problem.

12            MR. ALBRITTON: You were certainly there during the  
13     VirnetX trial as were these folks and me, and I am sure Your  
14     Honor remembers those snippets of those depositions that they  
15     played where they put together: Did you read this? Did you  
16     read this? Did you read this?

17            The clear impression of what they are trying to do  
18     is trying to imply that because these engineers did not  
19     specifically study the patents and aren't opining about  
20     non-infringement, that they did something wrong. And this  
21     goes to show that they are specifically instructed as part of  
22     their job that this policy predates this case, that they are  
23     not allowed to do that. So it leaves a horrible  
24     misimpression.

25            Nobody is going to get up -- these engineers are

1 not going to get up and say, I believe we don't infringe  
2 these patents. Okay? That implicates these privilege  
3 issues.

4 So this privilege point is sort of separate. It is  
5 just sort of a key fundamental fairness issue that they can't  
6 get up there and say you did something and it is wrong you  
7 did nothing when, in fact, there is an explanation for why  
8 they did nothing.

9 MR. CASSADY: Your Honor, I think I can  
10 short-circuit this.

11 THE COURT: Okay.

12 MR. CASSADY: We don't have any issue with --  
13 unless someone over here freaks out on me -- we don't have  
14 any issue with Apple saying to a jury that they have a policy  
15 that they let legal know about any intellectual property  
16 issues. We don't have anything about that. They don't have  
17 a policy that says engineers aren't allowed to look at  
18 patents. I am not sure what policy that is he is referring  
19 to.

20 But we are fine with saying: We talked to legal.  
21 The problem is when they go beyond that, which is that is not  
22 we respect intellectual property. That is we have a process  
23 we do when someone thinks we infringe intellectual property.

24 And what has really been -- from these documents  
25 people have been summarizing documents saying we have a

1 policy with respect to intellectual property. That is the  
2 line that is the problem. We weren't allowed to get behind  
3 that.

4 And so they can say to protect their engineers -- I  
5 understand their argument. I disagree. But I understand  
6 their argument that they can say, look, Your Honor, and the  
7 jury, our engineers were told to tell legal about any issues;  
8 and so that -- that is fine. I understand that response. We  
9 are fine with that.

10 Beyond that, I think the copying issue probably  
11 deals with it. I don't know why copies of the policy need to  
12 come in that --

13 THE COURT: About this business policy, what is  
14 your specific objection to the actual policy?

15 MR. CASSADY: Well, really, it is the motion in  
16 limine that is kind of outstanding about the policy. It can  
17 go on the list, and then we can fight about motions in  
18 limine. But part of my understanding was that Gilstrap  
19 didn't want us to have that kind of fight in front of him.

20 THE COURT: He doesn't.

21 MR. CASSADY: Exactly. So that is why we are  
22 bringing this up.

23 I guess what I would say is some of these policies  
24 may be totally irrelevant if copying doesn't end up being  
25 part of the case.

1 THE COURT: Right.

2 MR. CASSADY: But specifically I think the one that  
3 we should talk about is the business conduct one.

4 We have no problem with them saying that the policy  
5 that they tell legal about any issues they are aware of.

6 THE COURT: But what is your problem with them  
7 showing the jury the policy? What about this policy is  
8 objectionable?

9 MR. CASSADY: I think that specific policy that is  
10 all that one says, so I think that one is probably fine. So  
11 that is 305, right?

12 MR. POST: Yes, 305.

13 MR. CASSADY: So DX 305, I think that is fine they  
14 have it, as long as we have an understanding about that line  
15 being drawn where they are not saying, well, I have this  
16 policy, so I don't infringe.

17 THE COURT: I think if they do that, you can stand  
18 up and show the jury the policy, and say the policy doesn't  
19 say that, does it? It says X. Right?

20 MR. CASSADY: Right. But I guess the problem is  
21 that is still their belief -- they can still say we have a  
22 policy of that, and now -- I can't get behind -- that is the  
23 problem. It is the line. I can't get behind that policy  
24 because of the privilege objection. It gets into the other  
25 MIL issue, which is -- so I think we have agreement that they

1 are not going to say they don't infringe because of this is  
2 policy.

3 THE COURT: I heard that, too, and is that true?

4 MR. ALBRITTON: No engineer is going to get up  
5 and affirmatively offer testimony that I analyzed this, and  
6 we do not infringe this patent. That is why we have experts.

7 And that is sort of the interesting thing about all  
8 this argument, Your Honor. I mean, they act as if -- you  
9 know, they say they are unable to test this Apple's general  
10 belief that it doesn't infringe; but yet they have got  
11 experts running out of their ears, we have got experts  
12 running out of our ears. They have questioned all of them.  
13 We have questioned all of them.

14 You know, what an in-house lawyer thinks or doesn't  
15 think is sort of beside the point here now, okay, because  
16 in-house lawyers hire outside lawyers, us, and they hire  
17 experts; and it is, you know, well explained why Apple thinks  
18 the patents are invalid and not infringed.

19 THE COURT: All right. I am going to preadmit this  
20 business policy. It is admitted.

21 And I just want to note for the record it looks  
22 like we have agreement that there will be no Apple engineer  
23 standing up saying we don't infringe.

24 And tell me about that motion in limine. It has  
25 been a few weeks. What exactly were you requesting?

1           MR. CALDWELL: Well, I think the motion in limine,  
2 unless I am getting them confused, was actually one of their  
3 motions in limine saying that we couldn't do anything to  
4 elicit a privilege instruction. And that's why I feel like I  
5 am stuck walking on egg shells.

6           And I will just give you an example because while  
7 these guys were debating here for a second I pulled up  
8 Mr. Faruggia's deposition, and I asked him: Are you aware of  
9 any changes Apple plans to make through FairPlay in response  
10 to or in connection with this lawsuit? So I asked him about  
11 changes.

12           His answer was: Like I said, my understanding of  
13 that is through my counsel, and I don't think FairPlay would  
14 need to change in this case because I don't think we do any  
15 unlawful stuff.

16           And then I asked him: I said any what? I didn't  
17 understand the word. He goes: Unlawful.

18           I asked him, I said: Okay. You mentioned not  
19 doing anything unlawful. Does that mean -- are you saying  
20 you do not believe Apple is infringing? Instruction not to  
21 the answer.

22           Nevertheless, the witness says, despite the  
23 instruction not to answer: Based on the conversation and my  
24 understanding with Counsel, I don't think the implementation  
25 of Fairway has something to do with my understanding of the

1 patent.

2 Okay. Despite the instruction that I just said:

3 Mr. Batchelder: I think that is a waiver. I think  
4 he needs to say I don't know, you guys have privilege or else  
5 I need to be able to test it. And there was a debate between  
6 us, and he continues to instruct him not to answer.

7 I asked him: Why is it you believe that Apple does  
8 not infringe? I will instruct you that the reasons come from  
9 Counsel. Don't answer. He goes: I don't have any other  
10 reason.

11 Then I try to ask him just personally:

12 Okay. Mr. Farrugia, have you made any effort  
13 whatsoever to determine whether or not Apple was infringing.  
14 Everything is from communications with the lawyer. Okay.

15 If you set aside what your lawyers told you, have  
16 you made any effort whatsoever to determine whether Apple is  
17 infringing any of Smartflash's patents, if you set aside what  
18 the lawyers told you?

19 Okay. I will repeat what I said. The only  
20 understanding I have is through counsel -- is through my  
21 conversations with counsel.

22 And I said: Okay. Mr. Farrugia, I need you to  
23 listen very carefully. I'm trying to carve out what you  
24 talked about with your lawyers. If you set aside what your  
25 lawyers told you, have you made any effort whatsoever to

1 determine whether Apple was infringing any of Smartflash's  
2 patents?

3 And I repeat what I said, my knowledge is based on  
4 conversations I had with counsel, which we cannot have an  
5 opinion.

6 This is the way -- this is the way the depositions  
7 go. Even if I am trying to respect the privilege -- I mean,  
8 I am not trying to cast somebody in a bad light, but I don't  
9 know of a better word than it is like the guy is sort of  
10 conditioned to say as to everything, lawyers, lawyers,  
11 lawyers, lawyers.

12 And so the motion in limine last time, what I was  
13 trying very much to respect the instruction of privilege and  
14 we have each had instructions of privilege where appropriate  
15 I think, for the most part, in this case.

16 But there has got to be some range of fair  
17 exploration of an engineer, that is not going to elicit a  
18 privilege claim; and that is what we discussed last time  
19 about, you know, I'm certainly going to try to phrase the  
20 questions that don't elicit: What did your lawyer tell you  
21 about non-infringement? Beyond that, I think the guy is kind  
22 of conditioned to run there. I don't know what to do about  
23 it. That was the motion in limine we talked about last time.

24 MR. ALBRITTON: Your Honor, just a few sort of  
25 things in clarification. Certainly, none of our witnesses,

1 non-experts are going to offer opinions about  
2 non-infringement. Okay? But when they are up there beating  
3 these guys up -- and we will get to this second question --  
4 and I don't mean that pejoratively; but when they are  
5 cross-examining these witnesses, you don't have any personal  
6 opinion, you don't have any personal opinion, I certainly  
7 think it is fair game for them to say, you know, Apple has  
8 got -- we are in the middle of a trial, Apple has experts,  
9 Apple has lawyers that are explaining why they say, you know,  
10 Apple doesn't infringe or these patents are invalid.

11 I certainly think that is fair game, and that is  
12 different than offering any testimony which would, frankly,  
13 be expert testimony anyways from an expert that says it is my  
14 belief that Apple does not infringe. That is point number  
15 one.

16 But, really, point number two, Your Honor, and it  
17 is really sort of the elephant in the room because it  
18 underpins all of what is going on. Why in the world are we  
19 even getting into Mr. Faruggia or Ms. Sloan you work for the  
20 Court or Mr. Schenker you work for Apple, why is it that you  
21 don't think you infringe? Why are we getting into that?

22 We have got any -- I would, respectfully, submit  
23 there is no probative value of that. But to the extent that  
24 it is, it certainly -- any prejudice unduly outweighs that,  
25 the source of confusion.

1           They have got experts, we have got experts. Last  
2 time we heard in spades that this case should be about the  
3 technical merits of the case. I agree. We all have  
4 technical experts that are going to talk about the technical  
5 merits of the case.

6           And asking individual engineers to elicit testimony  
7 that says I don't know, okay, is entirely improper and ought  
8 to be excluded under both 402 and 403 because it is not  
9 probative to the issues in the case in light of the  
10 respective roles of the engineers and the experts, et cetera.

11           THE COURT: I couldn't help but ask that same  
12 question in my head, and maybe -- I just thought I was  
13 missing the point of the greater context; but why are you  
14 eliciting that type of testimony from Apple's engineers?

15           There may be just a very obvious reason, and I am  
16 missing it.

17           MR. CALDWELL: I think, one -- I think actually the  
18 most obvious reason is that patents are written for a person  
19 of ordinary skill in the art. And Mr. Faruggia is personally  
20 named in our complaint. He is the gentleman who had been at  
21 Gemplus that was Mr. Racz's business partner. I mean, these  
22 are guys who work in the space.

23           To my knowledge -- maybe I'm missing something, but  
24 to my knowledge, it would be an entirely new standard in this  
25 district if we are saying the technical folks who work in the

1 field of the art of the patent, you can't ask them questions  
2 about whether they understand things, if that is the way it  
3 works and whatnot. It is the ordinary course of things.

4 We could probably all think of so many different  
5 examples. But one I can think of is a great example just to  
6 look back at a past case with Mr. Albritton.

7 In that VirnetX/Apple case, there was the gentlemen  
8 Christophe Allie who worked at Apple who had actually filed  
9 his own patent application almost identical -- and that was  
10 the deposition -- it wasn't Mr. Albritton, but the other  
11 counsel for Apple actually walked out. It led to sanctions  
12 and things like that.

13 But there was no doubt that it was appropriate to  
14 take a patent claim and ask the guy about whether elements  
15 are met or not. He is a person of skill in the art who  
16 understands also how their product works. I can't imagine --  
17 I mean you have all these people that are paid and there are  
18 arguments of bias and all this.

19 I can't imagine actually it not being viewed as  
20 probative to take somebody who in their job knows the accused  
21 product as anyone possibly could and they are of skill in the  
22 art and to kind of ask them how those things relate. If it  
23 is going to be their strategy to say I don't know, I  
24 understand it is the lawyers, and walk away, okay; but if  
25 they have taken that route, I think at least we ought to be

1     able to establish that fact.

2                 Go ahead.

3                 MR. ALBRITTON: Okay. I'm sorry. I didn't mean to  
4     stand up, Mr. Caldwell.

5                 MR. CALDWELL: Oh, no. You are good.

6                 MR. ALBRITTON: A couple of things. I mean, first  
7     of all, Your Honor remembers all of this very well, I am  
8     certain. We all suffered through it. But the interesting  
9     thing is there was an order of sanctions about instructions  
10    not to answer. But if the Court will remember, there was no  
11    testimony about this at trial.

12                The issue of discoverability and the issue of  
13    admissibility, of course, are different inquiries, right?  
14    And the Court never ruled on the issue of admissibility. In  
15    fact, they never put in, as my recollection -- I could be  
16    corrected if I am wrong. You would probably remember better  
17    than I. -- but they never even put in that information, as I  
18    recall the case.

19                But sort of more fundamentally to the point here is  
20    it goes back to what Your Honor asked and what I asked.  
21    Okay? You know, if these people had -- you know, he said one  
22    of ordinary skill in the art, et cetera. The point is he  
23    knows that these people only have opinions based on  
24    privileged information. Okay?

25                So by asking the question, all you are doing is

1 either forcing somebody to invoke the privilege or leaving a  
2 false impression.

3 So, again, to the extent there is any probative  
4 value, it is substantially outweighed and should be excluded  
5 under Rule 403, Your Honor.

6 MR. CALDWELL: I don't want to elicit the privilege  
7 instruction or invoke the privilege, and it is not leaving a  
8 false impression to leave the true impression that that  
9 engineer can't come in and identify it or that that engineer  
10 didn't take 45 minutes to sit down and read it.

11 As to the Allie claim, it is ironic he would  
12 mention that. There was a specific agreement not to bring  
13 that in. Because of the same issue Mr. Cassady has already  
14 talked about earlier, we weren't going to talk about Apple's  
15 specific patents. So that same prejudicial reason is the  
16 reason that didn't come in.

17 But if Mr. Albritton is trying to make the point  
18 that nobody went into this with engineers, that is obviously  
19 not true because we still did it with the other engineers,  
20 whether it was Patrick Gates, who is the guy that got called  
21 adverse and testified at trial, or the other depositions that  
22 we talked about. So it absolutely was something we went into  
23 with engineers.

24 It is just that the -- Christophe Allie, the  
25 example I picked, what ended up happening is because of the

1 recognition of this issue of prejudice and confusion about  
2 applying for your own patents and whatnot, that was actually  
3 horse-traded away; and I think that may have happened in  
4 front of Judge Davis in a hearing rather than on the side.

5 THE COURT: All right.

6 MR. CASSADY: Your Honor, I am not going to argue  
7 any more.

8 THE COURT: Okay.

9 MR. CASSADY: I think I am going to try and chop  
10 this up.

11 It sounds to me like we have agreement that no one  
12 is going to say we don't infringe because we have a legal  
13 department. That is one of our issues. I think they have a  
14 hundred times said they are not going to do that. They are  
15 going to say we have a policy of giving it to legal, but they  
16 are not going to say we don't infringe because we give it to  
17 legal. The engineers aren't going to say that.

18 Are they going to say that?

19 MR. ALBRITTON: I, literally, don't even understand  
20 what that means. I mean, certainly nobody is going to say we  
21 don't infringe because we gave it to legal.

22 What we will say is, okay, I am not offering --  
23 they are not going to offer any opinions as to whether or not  
24 there is infringement. Okay? They will separately testify  
25 that they refer these issues to the legal department. Okay?

1           And, if pressed, they will say that I understand we  
2   are here in Tyler, Texas at trial; that Apple disputes it  
3   infringes and their experts have testified there is no  
4   infringement and invalidity. But they will not be offering  
5   specific opinions that they do not infringe.

6           THE COURT: Okay.

7           MR. CASSADY: That is one. So then with the policy  
8   issue that gets mixed up in this, they are not going to get  
9   up and say: I know we don't infringe because we have a  
10   policy, we have a policy of not infringing or we have a  
11   policy of respecting intellectual policy.

12          MR. ALBRITTON: Of course, we are not going to say  
13   that.

14          MR. CASSADY: Okay.

15          THE COURT: Great.

16          MR. CASSADY: Then I think the next step is to just  
17   make sure that, you know, we can ask their engineers on the  
18   stand -- and this is separate from the depositions -- we can  
19   ask those witnesses: You are not here to tell a jury your  
20   own personal reasons why you don't infringe the patents? And  
21   they should just say: No, I am not. Right?

22          MR. ALBRITTON: That is fair as long as they can  
23   say, you know, there were other people who are doing that.

24          THE COURT: Yes.

25          MR. CASSADY: Of course, they can, and that is

1 fine, yes. Yeah, that is fine.

2 MR. ALBRITTON: But the dispute, the elephant that  
3 we are ignoring, is the other question; and that is: You  
4 don't have any personal opinions. You didn't read these  
5 patents. You didn't form any opinions. That is what they  
6 want to do, and that is what is inadmissible. That is the  
7 hard question for Your Honor.

8 MR. CASSADY: Your Honor, this is the witness that  
9 is going to be on the stand. He is the person that is  
10 representing Apple right now. And, yes, he can say I'm not  
11 the one that did it. The other people did it. And that is  
12 fine. But at the end of the day the person of ordinary skill  
13 in the art on the witness stand who works at Apple didn't  
14 review the patents or didn't take the time to come up with  
15 the opinion as to why they don't infringe the patent or --  
16 those things are critical to willful blindness.

17 THE COURT: Right. I know that. I can see where  
18 that will go to willful blindness. But I will tell you when  
19 you get into that, then I think that their answers are fair  
20 game. Their answers -- I think you are dancing on this line  
21 of, yeah, because, you know, the company policy is to hand  
22 this over to legal and let them make those -- you know,  
23 whatever your response is. I'm just saying the further you  
24 wade into that, the more I think you crack that door of  
25 letting them respond with whatever they can respond with.

1           MR. CALDWELL: So long as -- I think so long as  
2 they are not going to say per Mr. Albritton's  
3 representations, well, here is what my lawyers told me, here  
4 is our non-infringement -- I mean, if he is going to say --  
5 if he is going to say, you are right, I don't because what I  
6 do is I hand that over to the lawyers, which is what I  
7 understand Mr. Albritton is saying, I think that is fine. I  
8 think that is a fine exchange right there.

9           THE COURT: I cannot imagine that this witness is  
10 going to say something on the stand that he asserted a claim  
11 of privilege to in a deposition.

12           MR. CALDWELL: I would hope not, but I --

13           THE COURT: Right.

14           MR. ALBRITTON: That's correct, Your Honor. But I  
15 think that -- you know, very skilled lawyer on the other  
16 side; but it is still, Your Honor, I would like to step back  
17 one second and just get to the sort of threshold question and  
18 talk about the probative value of those questions and the  
19 unduly prejudicial nature of it.

20           I understand we can do this response; but, Your  
21 Honor, this notion that you ought to be knowing that all of  
22 the witness's information is based on privilege, okay,  
23 knowing that there is a policy that requires engineers to  
24 send these on to Counsel, it is just not probative to say,  
25 well, you didn't form any individual opinions, you didn't

1 read this. That is not their job, Your Honor.

2 THE COURT: But plaintiff has to prove willful  
3 blindness, and that is part of their -- isn't that probative  
4 of willful blindness?

5 MR. ALBRITTON: I would, respectfully, suggest no  
6 because willful blindness, Your Honor, does not have to do  
7 with -- decisions are not made that lead to -- these  
8 individual engineers are not in the control group. These are  
9 not people that can make, for instance, admissions on behalf  
10 of the company. Okay? Therefore, their individual actions  
11 when they are following company policy is not probative --

12 THE COURT: But that is it, right, they are  
13 following company policy? And isn't it -- aren't they  
14 attacking the company's policy is probative of a willful  
15 blindness theme?

16 MR. ALBRITTON: I understand. The point, though,  
17 is they say the company is willfully blind. And an  
18 individual engineer that says I did not read these patents.  
19 I sent these on to the company's lawyers and the company is  
20 doing all of this. We are having a big trial about it. What  
21 those individual engineers do, that is not probative. And to  
22 the extent it is marginally probative, it is substantially  
23 outweighed because it is not their job. It is not their  
24 position. It is not their -- it is not -- you know, some  
25 engineer Payam -- I can't pronounce his last name.

1 MR. CASSADY: Mirrashidi.

2 MR. ALBRITTON: Yeah. You know, the question is  
3 not whether he was willfully blind; and whether or not he  
4 read these patents and formed opinions individually, does not  
5 give evidence toward this ultimate question. It is the  
6 company's knowledge. It is not --

7 THE COURT: Who could speak on the company about  
8 that -- from the company about that if not this guy?

9 MR. ALBRITTON: Well, I mean -- well -- I mean,  
10 they have got experts that are going to try to offer opinions  
11 as to this. It is subject to argument. You know, it is a  
12 good question. I don't know who specifically could speak to  
13 that.

14 THE COURT: What concerns me is that it is the  
15 lawyers who would assert privilege. I mean, I'm trying to  
16 get to how else they should be proving this if not through  
17 these guys.

18 MR. ALBRITTON: It's -- you know -- certainly, it  
19 is a great question, Your Honor. And I don't have a great  
20 answer other than I can tell you that an individual engineer  
21 who has got no position where he can make or she can make  
22 admissions on behalf of the company that they are in the  
23 control group and these people are just merely following  
24 instructions of the law department, okay, that is not  
25 substantially -- I mean, I think that to the extent it is

1 probative, it is outweighed. And I think they can make their  
2 case otherwise without asking these individual engineers:  
3 Did you read these patents and form any opinions about them?

4 THE COURT: Response?

5 MR. CASSADY: Your Honor, they can tell the jury  
6 they brought experts and they brought other witnesses to talk  
7 about those issues. And this witness can say Apple has hired  
8 these other people, that is fine. But at the end of the day,  
9 that guy that works at Apple isn't doing that. And the  
10 person who is on the stand isn't saying I submitting this to  
11 legal.

12 He didn't submit it to legal. He is the guy who is  
13 here testifying on behalf of Apple, and he has no opinion  
14 about it, so for willful blindness Dr. Jones isn't allowed to  
15 say I believe they have willful blindness, the intent of it.  
16 I think that was Your Honor's ruling. He is going to put the  
17 evidence out there. We should be able to put the evidence  
18 out there and let the jury decide willful blindness.

19 And I think we are -- we are on that line, I agree,  
20 Your Honor. We are happy to come to that line and stop. We  
21 just want that line to be defined, so we are not going to get  
22 in big fights in front of Judge Gilstrap.

23 THE COURT: Okay. I am going to let them go there  
24 and ask those questions, and I'm going to let the business  
25 practices policy in. And there was some talk about six other

1 policies, and they all relate to copying -- is that true that  
2 they all relate to copying and, therefore, they rise or fall  
3 with whether plaintiff is going to continue with its copying  
4 case.

5 MR. POST: I think, yes, that is correct. So I  
6 think there may be some that even can drop out without  
7 copying, that route. But, certainly, as to Mr. Faruggia, who  
8 was the one who was personally named, the documents that  
9 relate to him and his hiring would rise or fall with that.

10 MR. CASSADY: There are nine of them, I believe,  
11 Your Honor. And we will short-circuit this. If we go  
12 forward with the copying, we are not going to fight about  
13 these documents.

14 THE COURT: They're in. Okay.

15 MR. CASSADY: If we don't go forward with copying,  
16 clearly they shouldn't come in.

17 THE COURT: Is that agreeable?

18 MR. POST: That's fine.

19 THE COURT: Good.

20 MR. CASSADY: Thank you, Your Honor.

21 THE COURT: All right. We are going to let  
22 defendants go now. And we are going to see if we can take  
23 care of one of your objections -- or buckets.

24 MR. SCHENKER: Thank you, Your Honor. Josef  
25 Schenker for Apple. I guess one thing I want to start with

1 is getting the Court's guidance, and it's, I guess, sort of  
2 awkward to start with their motion; but I think there is an  
3 outstanding motion with respect to the number of exhibits on  
4 Smartflash's list.

5 THE COURT: Yeah. I have given that a lot of  
6 thought. And refresh my recollection. As I was thinking  
7 about this over the weekend, you-all had initially jointly  
8 filed a motion to get up to 400 exhibits; is that right?

9 MR. SCHENKER: That's correct.

10 THE COURT: Okay. And now plaintiffs are asking to  
11 get up to 750-ish; is that right?

12 MR. CASSADY: Yes, Your Honor, 750.

13 THE COURT: So the real issue that I am struggling  
14 with is that Apple has abided by that 400 limit, and they  
15 have worked very hard to get their number down below that.  
16 So I am concerned that if I give you all the way up to 750  
17 they are going to say we have got 300 other exhibits we would  
18 sure like in here, but we abided by the Court's order.

19 So help me work that out.

20 MR. CASSADY: I think the understanding of how that  
21 came about is probably a better way to do it. Actually -- I  
22 guess jointly -- we may not have moved jointly. We may have  
23 submitted unopposed to the motion to go to 400.

24 But the point is we weren't there -- under our  
25 understanding of the way that our exhibits were, we were not

1 there. They needed 400, and they came to us and said we want  
2 to go to 400.

3 And I said Your Honor -- I didn't say Your Honor.  
4 I said: Apple, that is fine. Just understand that, look, we  
5 may have later debates if you guys -- if we have issues about  
6 our list. But if you guys want to go to 400, fine, we can go  
7 to 400.

8 It wasn't, let's all agree to go to 400. It was  
9 them trying to go up to that number.

10 And then -- I mean, I hate -- I don't want to get  
11 back into all of it; but I would just say, Your Honor, we  
12 have been through tens of thousands of dollars of redoing  
13 exhibits over and over again over the last bunch of months,  
14 all at iterative objections of the way that exhibits are  
15 done.

16 We don't like it to be in by iPhone. We want it to  
17 be by a specific functionality. We don't like it being by  
18 iPod Touch, by something else. They kept reorganizing it,  
19 which is fine. We just kept working through it because we  
20 wanted to limit the issues in front of the Court.

21 And, Your Honor, right now we have 750 exhibits --  
22 or we don't have 750. We have 720, I think. But there is  
23 only 100 or so that are objected to. And those make up like  
24 ten buckets or nine buckets of objections.

25 And that really was the Court -- that was my

1 understanding of the Court's sensitivity in the last hearing,  
2 and we reduced it down significantly, and we are down to  
3 these objections.

4 My understanding is they don't have any additional  
5 exhibits. I could be wrong about that. But my understanding  
6 is they said they have got this number, they might be willing  
7 to go up to 500, but they couldn't go beyond that.

8 I guess what I would say here, Your Honor, is we  
9 have been through a lot of expense on this. If they have  
10 more exhibits I imagine they would have taken the chance to  
11 add 50 more and say we will go to 550 or whatnot.

12 I mean, we are kind of at the point where we have  
13 spent a lot of money with this iterative process; and if this  
14 was going to be an issue, then it should have been an issue  
15 originally, which is we are just going to object period.  
16 That has never been their position. Their position has been,  
17 let's continue to work through it. And now we are here on  
18 this.

19 THE COURT: All right.

20 MR. ALBRITTON: Thank you, Your Honor.

21 Well, this is -- this is actually fairly near and  
22 dear to my heart, and I think it is sort of ironic. You  
23 know, and I hate to pull, you know, this, how it always goes.  
24 But I have certainly never seen anybody stick, you know, 300  
25 disparate documents into a single exhibit and call it one

1 exhibit. I mean, that seems to be, at least, respectfully,  
2 very contrary to the Rules.

3 We are now sort of being punished for trying to  
4 work it out because I will -- without waiving privilege --  
5 there were folks who thought, well, we are just going to  
6 object that they are over the limit. And I worked very hard  
7 to try to avoid this dispute. And that is why we engaged  
8 them early on and said, look, these compilations are clearly  
9 not appropriate. Okay? You need to break them up. Let's  
10 work on this. It would have been quite easy for us to go,  
11 you know, we just object.

12 But how would that have been for Your Honor, right?  
13 That wouldn't have been easy for the Court. We are trying to  
14 make things better for the Court.

15 So we in very good faith worked hard to address  
16 these. This thing about expense, I mean, look, there is  
17 expense on both sides. They invited us to this party. We  
18 didn't invite them to this party. Okay? I can assure you  
19 that we are paying as much money as those folks are paying.

20 And talk about the burden of having to go through  
21 an exhibit that is 3,000 pages long and try to deal with the  
22 objections. That is the reason from the very beginning when  
23 they first served this list before objections were due, we  
24 said: Whoa, whoa, wait a minute, guys. This isn't right.  
25 They said: Oh, oh, yeah, this is right. We always do it

1       this way.   Okay?

2               We said, well, we think this is really not in the  
3       spirit of the Rules.   Let's try to work through it.   So it  
4       has been an iterative process in an attempt to work it out.

5               We did absolutely work to comply with the 400  
6       rules.   I was actively involved in that.   I told our people  
7       that -- you know, I was even skeptical the Court would want  
8       400 exhibits.

9               So we worked very hard.   We made hard decisions to  
10      get it down to 400, and they should abide by it.

11              And this last point -- and I think the Court will  
12      sort of see this today, we have worked extremely hard to  
13      withdraw objections, okay, because I didn't want this to  
14      last -- for selfish reasons -- eight hours today.   I didn't  
15      want it to last eight hours for Your Honor.   So we have been  
16      withdrawing objections.

17              Now they are saying:   Well, since you, Apple and  
18      Albritton, have been reasonable and started withdrawing  
19      objections, therefore, it is no big deal.   We ought to be  
20      able to have 750.

21              So I would, respectfully, suggest, Your Honor, that  
22      they should not be permitted.

23              I told Mr. Cassady on the phone -- we met and  
24      conferred about this recently -- if there is some -- I am not  
25      myopically focused on there have to be 400 and 400 only.   I

1 told Mr. Pearson and I told Mr. Cassady, look, if there are a  
2 few extras that you need, okay, up to -- I think I said 450,  
3 as they said, I will work with you. And all they kept coming  
4 back with was 750.

5 And one final point on this. Of the 725 or  
6 whatever, there are still compilations, okay, still things  
7 that are not proper under the Rules. What we have done is we  
8 have said, look, we can live with these compilations. They  
9 are sufficiently similar that it is not unduly burdensome for  
10 us to deal with them in this manner.

11 So I would, respectfully, suggest that the Court  
12 not allow them 750, we go back to 400, and they just have to  
13 cull their list.

14 You know and I know they are not using 700 exhibits  
15 at trial, okay, and we ought not all have to suffer through  
16 this and have all this uncertainty about, you know, what we  
17 are going to see the night before as an exhibit that is going  
18 to be used. That is one of the reasons we have got this Rule  
19 there is going to be a procedure for identifying exhibits.

20 You know, they have only got a universe of 400 they  
21 have to worry about. We now have a universe of, you know,  
22 almost double that that we have to worry about. And that is  
23 not fair, Your Honor, and that should -- the motion should be  
24 denied.

25 MR. CASSADY: Your Honor, the size of the companies

1 is so disparate, it is not even funny. So the idea that our  
2 numbers being even close to one another considering the  
3 gargantuan size of documents we are dealing with versus the  
4 much more limited size of documents they are dealing with, it  
5 is just not a fair comparison.

6 We have got lots of iteration of products. They  
7 refused to agree to representative products even though they  
8 work the same across everything.

9 Even though their rogs don't identify a single  
10 difference on these products but they still won't agree to a  
11 representative product, so we have to put all 105 user guides  
12 that show each of these devices have a screen, each of these  
13 devices have software, each of these devices have various  
14 things.

15 And so the issue is -- and they set up a  
16 meet-and-confer, we are putting you to it. We are putting  
17 you to it to prove it. Well just give me the extra hundred  
18 so that we can go through it and put them into the record and  
19 have a JMOL evidence about that issue.

20 Same thing with the surveys, there is a lot of  
21 surveys on the exhibit list because one of their objections  
22 to our surveys is that through time -- you can't use this  
23 survey to prove through time that the feature was driven  
24 alone by our -- this feature or the product was driven.

25 Well, we have got their own surveys that show that

1 the thing stays pretty constant or actually moves up as far  
2 as drive. So, therefore, our survey now is relatively  
3 similar to surveys in the past that you guys have run.

4 So that is why you need all of the surveys because,  
5 again, they won't agree to representative products so you  
6 have to put the iterations of those products going through  
7 time on the surveys. And that takes a lot of documents.

8 And that can very easily be talked about in front  
9 of a jury, a large number of documents very easily talked  
10 about in front of a jury using examples. But the point is,  
11 without that JMOL evidence, we are in trouble. And that is  
12 exactly what they are trying to cause is like a choke point  
13 on the exhibits coming in so that they have a JMOL position  
14 to say we never agreed to representative products, you tried  
15 using a representative product and didn't get the rest of the  
16 evidence in the record, therefore, JMOL. That is what we are  
17 dealing with.

18 MR. ALBRITTON: Your Honor, at the time we agreed  
19 to this 400 limit, they knew there were no representative  
20 products. Again, this is their party. They invited us to  
21 it. They knew all of this at the time. They just thought  
22 wrongly that they could lump a bunch of things together,  
23 okay -- and his comment about JMOL is exactly right. I mean,  
24 let's call a spade, a spade.

25 The reason they want to lump all these things

1 together is because they want to stick them in and think they  
2 are all going to be there for record purposes. But as Your  
3 Honor advised us last time, just like Judge Davis's rule and  
4 Judge Gilstrap's rule is the same, they have got to talk  
5 about them, okay, so they knew all of this at the time.

6 So, you know, Your Honor, it is just -- it is just  
7 not fair. It continues -- not only has it been a burden to  
8 this point, but it continues to be a burden. And they ought  
9 to whittle it down to what they need.

10 MR. SCHENKER: If I can respond, Your Honor, to the  
11 point about representative products as well. At least three  
12 of the exhibits on their list are the user guides that  
13 Mr. Cassady said we need to show product by product. Those  
14 are the compilations, actually, that we have agreed to. So  
15 these hundreds of user guides that they think they need,  
16 those are three exhibits on their list. You know, I don't  
17 understand what the other 750 exhibits need to be from that  
18 perspective.

19 MR. PEARSON: Your Honor, Mr. Albritton is talking  
20 about fairness, and I think that is a really good point to  
21 look at. What -- we are really being subject to a gotcha  
22 here. They want to talk about all of our surveys being one  
23 compilation. There is 300 documents all in one exhibit, can  
24 you believe it? That just shocks the conscience.

25 Well, Mr. Post sent us an email and he said: We

1 think those surveys should be broken up by product. Here is  
2 the eight ways to break it up. So what we considered a  
3 single exhibit, they considered eight.

4 And then at that point, you know, we agreed to 400.  
5 And then we had the hearing on the 6th, and then the Court  
6 gave the guidance about the compilations, which is perfectly  
7 fine, and then so we are going to have to break it up more,  
8 which is fine. We are happy to do that. And now there is  
9 like, oh, 400, gotcha.

10 That -- just -- we really have been doing the best  
11 we can to remove exhibits to reorganize our list however they  
12 want at every step whenever they have sent us their next set  
13 of now we think it should be organized this way. We are  
14 really doing the best we can.

15 And if it was going to be just a hard 400  
16 individual documents, if that was the agreement that we  
17 didn't know we were making, we wish we could have had this  
18 fight earlier when we actually had time to deal with these  
19 issues as opposed to wasting time on the eve of trial with a  
20 gotcha situation.

21 MR. SCHENKER: If I may, Mr. Pearson has his  
22 timeline a little confused. The motion for -- the joint  
23 motion for 400 exhibits was filed I think the day of or the  
24 day after each party exchanged and filed their exhibit lists,  
25 which means we had no idea that they had compilations on

1 their list when that motion for 400 came through.

2 And, I mean, during the meet-and-confer beforehand  
3 when we were talking about how much is reasonable to go up;  
4 and, frankly, Your Honor's standing rule starts with 250. We  
5 talked to them. Should we go to 300, 350? And we were told,  
6 we don't think there will be anywhere near that amount.

7 Well, that is because when you group together all  
8 these documents, sure, you don't need anywhere near that  
9 amount. If you are going to put -- more than 1200 documents,  
10 I think in their motion is what they have acknowledged at  
11 this point in that first list, you need to bucket that down  
12 to 180 exhibits.

13 You know, it is not ambushing them. From day one  
14 we said we think that, you know, you shouldn't have  
15 compilations. And their response was, well, some  
16 compilations surely can be fine.

17 We went through and we identified what are the  
18 issues with some of these compilations. We weren't saying  
19 you have to break down your compilation into this group of  
20 this product and that product and then it is perfect. The  
21 issue is you had a compilation that dealt with eight  
22 different authors on four different products on, you know --  
23 I think it was an eight-year timeline.

24 And we said: How can that possibly be a single  
25 exhibit? That doesn't mean that if they break it down into

1 four sub-exhibits it suddenly becomes reasonable. It is an  
2 example of why that is so unreasonable to begin with.

3 MR. PEARSON: That is fine, Your Honor. You are  
4 hearing that they have definitely reserved their right to  
5 change their minds and object to new things. I mean, they  
6 give us guidance on what they want, and we try to follow it.  
7 And it is like, oh, well, just because we said that is how we  
8 would like to organize it, that didn't mean that was our  
9 final position. We are doing the best we can. That is all I  
10 am saying.

11 MR. ALBRITTON: We didn't change our minds, Your  
12 Honor. I mean, the point is we expected that people would  
13 comply with the Rule. Anybody knows that documents from  
14 eight different people over an eight-year span that are from  
15 four different products, anybody ought to know that that is  
16 not a proper exhibit, Your Honor.

17 So this is not -- it is a -- if anybody is at  
18 fault, it is me. The buck stops here on this one because  
19 they keep saying to us, well, tell us what you think is  
20 proper. So we have gone through and we have said, look, we  
21 think this one is fine, this one is fine.

22 But, candidly, they should have just issued a list  
23 with 400 individual exhibits in the beginning. So this  
24 suggestion that this is somehow a problem of our making, I  
25 think is not well-founded.

1           THE COURT: I just want to know how you intend to  
2 use 750 exhibits at trial?

3           MR. CASSADY: Your Honor, I think it is a very  
4 simple thing. It is a situation where you point to a  
5 specific example of a document. You say throughout time this  
6 exact piece of information shows up over and over and over  
7 again on the following exhibits. That is very easy.

8           In the VirnetX/Apple case I think we put 500  
9 admitted exhibits that went to the Federal Circuit from one  
10 side. It was significant. And in that same VirnetX/Apple  
11 case we had compilations. Mr. Albritton is acting like this  
12 never happens. We had compilations in that case. It  
13 happened in that case.

14           So that is why I am confused by this. It is a  
15 scenario where I agree that they tried to identify problems.  
16 The problem is we asked them to identify all of the problems  
17 so we could deal with them or we would come to you on them.  
18 Instead of doing that, they identified some of the problems.

19           And we fixed it. Then they identified more  
20 problems. And we fixed it. They identified more problems.

21           I don't think there is anything -- there is no  
22 complaint here other than the general size of the list. That  
23 is the only complaint, Your Honor.

24           THE COURT: I also heard -- I hear, though, that,  
25 yes, we also made difficult decisions about our own exhibits;

1 and there are some more that we would have put on our list  
2 had we not tried to comply with the Rule.

3 So how do I cure that prejudice?

4 MR. PEARSON: Well, I don't think we object to them  
5 having an opportunity to add more exhibits to their list if  
6 that is what they would like to do. I think we will  
7 obviously be reasonable in our objections and try to limit  
8 them as much as possible.

9 And I also would like to point out that this  
10 argument about, well, how could you possibly use all of these  
11 exhibits, kind of gets to the point that there is really no  
12 prejudice. If there are exhibits on our list that we don't  
13 get around to using and don't come into the record for  
14 everyone's understanding, what is the harm? We have 10  
15 buckets --

16 THE COURT: The harm is --

17 MR. PEARSON: Well, we have 10 buckets --

18 THE COURT: Huh-uh, stop. The harm is that every  
19 night before trial that have got a list of 750 that they are  
20 waiting on you to disclose which ones you are going to use  
21 for the next day, right, or however you-all have agreed to  
22 let them know about their exhibits.

23 I am saying their universe is bigger than yours.  
24 That is the harm.

25 MR. CASSADY: Your Honor, we only have a couple of

1 witnesses. They have 20. The universe is bigger. That is  
2 just how it works.

3 THE COURT: All right. Well, first, let me say  
4 that I commend both sides for trying to work on your  
5 exhibits. I appreciate that. And I am going to -- we are  
6 going to take a break in a minute, and I am going to ask you  
7 to continue to do that while I handle these criminal matters.  
8 No, no, no. It is only 10:15. It feels like it has been  
9 longer.

10 MR. ALBRITTON: It just feels like it's 5:15, Your  
11 Honor.

12 THE COURT: It feels like it has been longer. We  
13 are going to stick right to this.

14 Okay. I am going to move forward with dealing with  
15 the merits of the objections to your current exhibit list.

16 I am also going to give Apple time and opportunity  
17 to add exhibits if they need to, which is greatly  
18 discouraging to me because what I want to do is deal with all  
19 of the exhibit issues now.

20 So over the lunch period I would like for you to  
21 have a meaningful meet-and-confer about what the new exhibit  
22 might look like and what disputes might be on that list. But  
23 we are going to move forward with the groups, as y'all have  
24 discussed. And there is, from what I understand, ten buckets  
25 of 100 disputes on the plaintiffs' exhibit list, and I am

1 going to deal with those.

2 And so, Mr. Schenker, tell me about your actual  
3 exhibit now that we have talked about the motion for leave to  
4 have more exhibits.

5 MR. SCHENKER: Thank you. One bucket that I think  
6 we want to talk about is Exhibits No. 136.007, .008 and .009  
7 on their list. And those are documents that relate to an  
8 asset acquisition agreement between Smartflash Techs Limited  
9 and Smartflash LLC.

10 These documents basically put out the purchase  
11 price that the LLC -- one of the plaintiffs bought the  
12 product from the second plaintiff for 2.25 billion dollars,  
13 and we think these should be excluded. They are highly  
14 prejudicial.

15 You know, we have deposition testimony from the  
16 witnesses -- oh, we have got deposition testimony from the  
17 witnesses that no money exchanged hands between the parties;  
18 that their interests were aligned during this; that, in fact,  
19 one witness said there was no negotiation.

20 And we think that these are highly prejudicial  
21 numbers that -- you know, to put in front of a jury it is  
22 just inappropriate.

23 THE COURT: Remind me about, wasn't there argument  
24 on the flip side of this about some evidence that Mr. Racz  
25 offered to recoup his return on investment at a very minimal

1 amount of money? I am just seeing the other side -- I mean,  
2 I'm trying to remember what happened with that. Does that  
3 make sense? It was weeks ago. Did I carry that motion? Did  
4 I let that in?

5 MR. CALDWELL: My recollection is that that was  
6 carried.

7 Is that correct, Kevin, or no?

8 I don't know what I am interpreting --

9 THE COURT: Because here is what I am saying. You  
10 know, here you want this 2.2 billion number out, but you want  
11 in the 200,000 number.

12 MR. CALDWELL: I think it came up in the context of  
13 a motion in limine that was related to unaccepted offers.  
14 And some of these were even like third parties being like,  
15 hey, man, will you take X? That kind of thing. And I want  
16 to say that motion in limine was carried.

17 MR. BATCHELDER: It was denied.

18 MR. POST: That was denied.

19 THE COURT: It was denied. Okay.

20 MR. CALDWELL: That motion was denied, so then  
21 there you go.

22 THE COURT: So it is coming in, this information is  
23 coming in.

24 MR. POST: Right. And I think one other useful  
25 point is that their expert didn't rely on the

1 2.25-billion-dollar transaction. At any point if there  
2 wasn't it was an admitted not arm's length deal. And there  
3 was not an actual transaction. I believe it was sort of a  
4 promissory note that there would be -- that this was an  
5 acknowledged amount.

6 As between two companies that are affiliated, you  
7 can come up with any number, pluck it out of thin air and say  
8 these patents are worth whatever you want and come up with a  
9 new number.

10 And the fact that no one has relied upon it as a  
11 valid value to the patents, I think is indicative of the fact  
12 that it has little to no probative value. But as such a  
13 massive number, is it highly prejudicial as both an exhibit  
14 document and also this goes to another -- we have objections  
15 to some of the deposition testimony that has been designated  
16 that relates to this agreement, so...

17 THE COURT: Okay.

18 MR. CALDWELL: I would just say in response to  
19 Mr. Post's argument, everything he just said applied to  
20 unaccepted offers from third parties as well.

21 If you have somebody who just comes and says here  
22 is a number, that is no different. Their damages guy isn't  
23 relying on that as part of his calculation for the number he  
24 proposes, so I mean it is like goose/gander sort of --

25 THE COURT: I think that is my concern, Mr. Post,

1 is if I am letting in this really low number, why shouldn't I  
2 let in this really high number? Maybe none of it should come  
3 in.

4 MR. POST: Well, I think there is a big difference  
5 between those two. In one case with a high number, those are  
6 two affiliated companies. Those are -- the agreement may  
7 have been signed by the same person on behalf of both  
8 entities, you know, as opposed to somebody making -- and they  
9 are free to say: Mr. Racz, you didn't accept that offer, did  
10 you? No.

11 So they have the ability to characterize that in a  
12 different way than this, which I think it is completely  
13 unfair to even call it a transaction. It has no tie. There  
14 is no value that anyone can, has, or will say relates to  
15 these patents. And that is why I think there is a big  
16 difference between that and the unaccepted offers.

17 Those are -- those were two -- that would be me and  
18 Mr. Caldwell negotiating or something. We are not aligned;  
19 we don't have the same interests. But if me and Schenker  
20 are -- let's talk about I will you -- you give me your  
21 notebook, I will give you \$5,000. That is not indicative of  
22 the fact that has any value at all. I do think there is a  
23 pretty significant difference between those two buckets.

24 THE COURT: All right. Tell me how you are going  
25 to use this and why it is relevant.

1 MR. SUMMERS: Thank you, Your Honor.

2 John Summers for Smartflash. There are actually  
3 two or three issues with this document on our exhibit list  
4 that relate to other documents that they are seeking to  
5 preadmit today.

6 And there are a lot of documents and a lot of  
7 deposition designations that are about our corporate  
8 structure, how they want to put before the jury that we are a  
9 fake company; that all of these financial documents are for,  
10 you know, tax ramifications, for weird -- there are weird  
11 numbers. There is a one-dollar figure next to the '720  
12 patent on an exhibit. And they want to put all of that into  
13 evidence.

14 But then this exhibit, which is sort of -- of the  
15 same ilk, sort of arising from the same sorts of tax-related  
16 transactions, they say, oh, that is too prejudicial.

17 So, Your Honor, we would think that, putting the  
18 offers to purchase sort of as an aside, none of this is  
19 really relevant. None of that corporate structure stuff is  
20 really relevant. None of our tax records and our finance  
21 records and all of that stuff which comes into this amended  
22 asset acquisition agreement and this 2.25 billion number, we  
23 just think all of that should be out, it is all irrelevant,  
24 it is all outside the merits.

25 So if they would agree to drop all of those

1 designations and drop all of those exhibits, we would be fine  
2 with not preadmitting this amended asset acquisition  
3 agreement.

4 But if they are going to come forward and they are  
5 going to put forward all these financial documents and they  
6 are going to put forward all of their designations about how  
7 nobody works in Tyler. We don't have any employees, we don't  
8 do anything like that, I think if that is going to come in,  
9 this should come in.

10 But, respectfully, Your Honor, I think none of it  
11 should come in. None of that has to do with infringement, it  
12 doesn't have to do with validity. It doesn't have to do with  
13 damages. It is sort of an irrelevant point.

14 So that is what I would say as the main thing about  
15 the amended acquisition agreement.

16 But if that stuff is going to come in, I think that  
17 Your Honor's point earlier about the unaccepted offer is  
18 in -- the low offers and the high offers should all be in  
19 there together.

20 THE COURT: Okay. Response? And let me hear a  
21 response about this corporate structure line of questioning,  
22 evidence, whatever. I mean, are you-all going to get into  
23 that?

24 MR. POST: So I was just going to say I don't think  
25 that the -- to the extent there are disputes about corporate

1 structure, chain of title, ownership of the patents, there  
2 are documents that relate to that actual chain that you have  
3 seen now that don't require that this particular document  
4 with this number to be used. There is an assignment  
5 document --

6 THE COURT: I'm not talking about -- I'm not  
7 talking about chain of title issues. I am talking about this  
8 notion of, you know, here is Smartflash, and they are a  
9 fictitious company and here is all these -- that line of  
10 questioning, which I thought we had a MIL about.

11 MR. POST: Right. We do. And I think we have no  
12 intention of eliciting testimony or suggesting that  
13 Smartflash is a shell company or a patent troll. We dealt  
14 with those in the MILs.

15 I think that there are -- let me pull up the  
16 language that we had. So it was agreed MIL 6: There will be  
17 no argument, evidence, testimony, or reference to Smartflash  
18 having engaged in forum shopping or litigation abuse or that  
19 the Eastern District of Texas is the wrong venue for this  
20 litigation.

21 This motion is not -- I'm sorry. There is the  
22 shell one -- this is also I think related, though, because it  
23 has the following sentence: This motion does not exclude  
24 reference to underlying facts related to when Smartflash  
25 opened its Tyler office, how much work is done in the

1 Smartflash Tyler office; and when Smartflash sued in Tyler  
2 and/or decided to sue.

3 I think there are some facts, some basic underlying  
4 facts that we do think are relevant and kind of akin to --

5 THE COURT: Like what? I mean, just get -- let me  
6 just hear the meat of what --

7 MR. POST: So I think we would like to have  
8 testimony that says that Smartflash opened its Tyler office  
9 after it decided to sue; that it opened its Tyler office in  
10 April of 2013; it filed suit in May of 2013.

11 I think the fact that there is no employee in the  
12 Tyler office might qualify as one of those facts. Not  
13 calling Smartflash a shell company; but as to its relationship  
14 to Tyler, I think those facts are relevant.

15 MR. ALBRITTON: I'm sorry, Your Honor.

16 THE COURT: No, you're fine.

17 MR. ALBRITTON: Just setting aside when the office  
18 was opened, there are some other important things. There is  
19 this gentleman named Unterhalter -- maybe I mispronounced  
20 that again. But he does not have -- the company is managed  
21 by sort of an asset management firm. It is owned by a series  
22 of trusts that are in one way or another related to Patrick  
23 Racz and/or family members. He is the hypothetical  
24 negotiator in this. I think both parties agree on that.

25 This Unterhalter fellow has no -- you know, he was

1 not involved -- he owns a lion safari park in Florida. Okay?  
2 He has got no background in patent acquisition, licensing, et  
3 cetera, so -- just that those sorts of facts relate to the  
4 hypothetical negotiation and the like.

5 And just the motion in limine he read shows you  
6 that it was certainly agreed by the parties and contemplated  
7 that some of this stuff could get in.

8 We are cognizant of the Court's out-loud wondering  
9 last time about if we get into opening, you know, when an  
10 office was opened, et cetera. We understand that could open  
11 the door.

12 But the underlying facts about the corporate  
13 structure are relevant to damages, Your Honor; and that the  
14 president has got no history involved in patent licensing.  
15 He is not an inventor. He doesn't even own a stake in the  
16 company, and he happens to be the guy that they put up as the  
17 corporate rep on behalf of the company.

18 So the fact that their corporate representative,  
19 the person who spoke on behalf of the company, has got, you  
20 know, no involvement with the development of this technology,  
21 has got no experience whatsoever with respect to patents, the  
22 fact that, you know, he owns a lion park and that is what he  
23 does for a living, those sorts of -- and that these are owned  
24 by these various trusts.

25 We are not going to get up and say -- you know, I

1 was around in Marshall when it happened. Nobody is going  
2 to -- in the O2Micro days.

3 Nobody is going to get up and say this is a tax  
4 dodge or that they are trying to hide money. We are not  
5 going to do that. But just the underlying facts relate to  
6 understanding who the parties are, relates to the  
7 hypothetical negotiation and the like.

8 MR. SCHENKER: If I may continue, please, on that.

9 With respect to the corporate structure also, there  
10 has been deposition testimony on this by some witnesses,  
11 including the corporate directors, that Smartflash has plans  
12 to commercialize these inventions and Smartflash wants to  
13 expand in the U.S. market.

14 And I think the fact that there are no employees  
15 here in the U.S. market and what the corporate structure is  
16 and what they actually have in place versus prospective  
17 testimony -- again, we have got business plans about  
18 commercializing these inventions ourselves, I think, you  
19 know, that becomes highly relevant to cross-examine and to  
20 deal with and responding to them saying, yeah, we have plans  
21 to business size this. It is not just about licenses. It is  
22 not just about patents, it is about building a business.  
23 Well, where are the employees? What is the business?

24 MR. CALDWELL: We might need to back up just a tiny  
25 little bit there. Mr. Albritton read to you an agreed motion

1 in limine from before the last hearing. In the hearing --  
2 see, what happened was we tried to find disputes where there  
3 was agreement to take those off the table and we argued  
4 things where there were disputes.

5 What Mr. Albritton did not read to you was our  
6 Motion in Limine E -- I'm sorry. Mr. Post did not read to  
7 you was our Motion in Limine E which was argued and which was  
8 granted at the hearing.

9 And so that is -- it is important because he is  
10 talking about there is the carveout as to the agreement, and  
11 then we argued about parts that were in dispute. That motion  
12 in limine that was granted was any argument, evidence,  
13 testimony, or reference that Smartflash or any of its  
14 investors is a shell company, shell corporation, or trust or  
15 any insinuation that any trust or any other aspect of  
16 Smartflash's corporate structure are suspicious or improper  
17 or any argument, evidence, testimony, or references to  
18 Apple's job creation in the United States.

19 That was the motion in limine that was argued as to  
20 all this portion about anything about shell corporation,  
21 shell company, and trust. I was arguing about the talk of a  
22 BBI trust, any insinuation that that is improper.

23 So focusing on the part that was agreed as sort of  
24 the common ground is really missing the boat. We came and  
25 argued about the rest, and you are right there was a motion

1 in limine on it.

2 I don't know that this is the sort of thing that  
3 you care too much about. Mr. Albritton was very much  
4 misstating Mr. Unterhalter. Mr. Unterhalter is a gentleman  
5 in his 80's. He has been a director on the board of  
6 directors of lots of big companies, including a cable company  
7 that he negotiated huge deals for, et cetera, et cetera.

8 What he does now at this stage of his life, he does  
9 not own a lion park. One of his friends does. And what he  
10 does is he manages it in his basic retirement in Palm Beach  
11 in Florida. I don't think any of that matters.

12 But trying to come up here and disparage him and,  
13 hey, guess what, we want to come embarrass this guy, it  
14 doesn't make any sense. I mean, we are just embellishing  
15 facts that try and make it sound egregious. For some reason  
16 we need to get into it. But I think you have addressed this  
17 through the motion in limine.

18 And one of the things that I have as a concern is  
19 they get up and they say what they want to talk about and  
20 what they don't want to talk about. Well, last night I was  
21 listening in on the document phone call and chiming in on  
22 certain issues, and I took up with a couple of the folks from  
23 the Ropes team last time that they want to go into you are a  
24 company with zero employees and you are just formed for some  
25 sort of legal purpose here right before the suit and things

1     like that.

2                 Well, part of the reasons we have motions in limine  
3     on it is because we are trying to keep it tried on the merits  
4     because it is well-known -- I mean, there have been  
5     Congressional Reports on Apple is notorious for having these  
6     shell companies in Ireland, and they run money through them  
7     to save hundreds of millions or billions and billions of  
8     dollars in tax money.

9                 And I think a large portion of why there are  
10    motions in limine on this is because the trial can't be about  
11    one side having a company with no employees but not the  
12    other, and it really doesn't need to be about either. It  
13    ought to be about the questions that are for the jury because  
14    nothing about that, nothing about it goes to infringement,  
15    validity, or damages.

16                And as to Mr. Albritton's point, he also gets up  
17    and says everybody agrees hypothetical negotiation will be  
18    with Patrick Racz, so we need to talk about this other guy  
19    who got involved later who runs a lion park. That is a  
20    complete non-sequitur. They want to complain about certain  
21    things they find to be distasteful, but that is the point of  
22    a motion in limine, so we are not both doing that throughout  
23    the trial.

24                THE COURT: Okay. Let's get back to the document,  
25    which was, I believe, this interchange of the

1 2.2-billion-dollar amount. And what I heard, I think, from  
2 Mr. Summers is, look, if they are not getting into this shell  
3 company, full of trusts, kind of line of questioning about  
4 Smartflash, then we are good at excluding this document.

5 And what I am remembering now is I think I even  
6 granted a motion in limine to that effect.

7 And so I am going to sustain the objection. I'm  
8 going to exclude that document under the same -- I am going  
9 to exclude it for now; but just know that if we get into that  
10 covered context of the motion in limine, that notion of the  
11 trust -- and I'll put this in the order for Judge Gilstrap to  
12 have in front of him -- but if you go there, if we get into  
13 this notion of they are just a bunch of trusts and whatever,  
14 then I think the document is fair game.

15 So I am keeping it out because I think you ought to  
16 just walk away from that issue. But if you tread in there,  
17 then I think that my ruling would be different.

18 MR. POST: Understood. We have no intention of  
19 going against the MIL. I truly agree with Mr. Caldwell, we  
20 did agree during the hearing not to refer to shell companies  
21 or make the suggestions that trusts are in any way improper

22 But I think when you look wholistically at the  
23 MILs there are -- in the agreed-to MILs, there are certain  
24 basic facts that talk about Apple employment. Some of those  
25 equivalent facts I think would fall into the agreed terms

1 without going anywhere near the shell company issue or any  
2 suggestion that that is somehow an improper structure.

3 MR. CALDWELL: So what I -- I would like a clear  
4 answer because I want to know where we are on this door  
5 opening; and it is unfair, obviously, for Judge Gilstrap to  
6 try to pick it out of a long transcript on the fly.

7 As to the motion in limine, they are not making  
8 reference to the trust. That is in the express motion in  
9 limine that was granted. I don't think they are disputing  
10 that.

11 MR. POST: No.

12 MR. CALDWELL: Okay. So my question is what  
13 about -- what about saying you are a company with no  
14 employees that was formed a couple of weeks before the  
15 lawsuit? Where does that fall on the spectrum and does that  
16 open the door? Because I think that is kind of the elephant  
17 that is walking around in the room right now. I think they  
18 are sort of dancing around their position.

19 MR. POST: That was my point of reading that second  
20 sentence of the agreed MIL 6. I think that is exactly what  
21 that says.

22 MR. CALDWELL: And we argued the disputed one  
23 thereafter which was granted, so --

24 MR. POST: So I think those two actually fit  
25 together and don't -- and that having a -- exploring those

1     basic facts without a suggestion that -- that is your  
2     choice -- if Smartflash doesn't want to have employees here,  
3     that is fine. I'm not suggesting it is bad or the fact that  
4     they -- that our trusts are somehow improper, so I don't  
5     think those two things are inconsistent.

6             THE COURT: So why are you asking them about them?  
7     Why are you putting on evidence of that?

8             MR. POST: Well, I think it -- it is important,  
9     relevant to the level of context if they are going to have  
10    testimony about Tyler presence or Texas presence.

11            THE COURT: So what I am hearing is you want to say  
12    we are in Tyler and we have a business here in Tyler. And  
13    they want to say, well, you actually don't have any employees  
14    here in Tyler, and --

15            MR. CALDWELL: See, the last thing I want to do is  
16    do some sort of pandering on this. What I would envision --  
17    and I am really glad we are actually just talking this out --

18            THE COURT: Yeah.

19            MR. CALDWELL: -- maybe we will get it resolved.

20            What I would envision -- the truth is that Mr. Racz  
21    studied patent litigation for a while because this is new to  
22    him. He is not even American -- he studied the judicial  
23    system. He actually watched a trial. Okay. He watched  
24    VirnetX/Apple. He sat through and watched it. And it is no  
25    secret that is how he and I became more acquainted.

1           I don't intend to even drag that out. We are not  
2 talking about other litigation. His point is that -- his  
3 point is that he tried to research United States patent law,  
4 saw that the Judges here had experience, and thought that  
5 this would be a fair place to file.

6           And I am happy not touching it at all. What I  
7 can't do is I can't put him up for direct and then have him  
8 beat up on cross. It is like, oh, you didn't even tell the  
9 jury you have got this nonsense zero employee company that  
10 you set up to sue or anything like that. I just want it to  
11 be fair.

12           What I would envision that I think is fair is just  
13 simply saying, you had your company, it had the patents, and  
14 what did you do? We put them in a Tyler company before we  
15 brought the lawsuit. That is it. I intend not to do  
16 anything to pander.

17           If that opens the door, I am happy not saying that.  
18 I just don't want -- I just don't want to not say something  
19 to the jury and have it look like we are afraid of a fact or  
20 hiding any sort of a fact, and then they come back and take  
21 it out on cross.

22           MR. POST: I think if that were the direct  
23 testimony, the cross, consistent with the agreed MIL, would  
24 be when was that office opened? How many people are there?  
25 And when you decided to sue. I don't think we need anything

1 more than that.

2 MR. CALDWELL: How does the "how many people" part  
3 matter? I mean, if that happens then we need to point out  
4 that as a matter of legal construct -- which jurors are not  
5 familiar with -- Apple themselves sets up zero employee  
6 companies.

7 I don't know why we have to get into that. I am  
8 happy to say --

9 THE COURT: Are you getting into at all the fact --  
10 the notion that Smartflash is eventually going to -- or is in  
11 the process of --

12 MR. POST: Commercializing.

13 THE COURT: I'm at a loss. Commercializing its  
14 inventions.

15 MR. CALDWELL: No, I actually don't intend to do  
16 that. The only thing is I have seen their depositions of  
17 him. And, of course, everybody likes to play this game, oh,  
18 you don't even have a product, to play on some emotion with  
19 the jury.

20 Now, I am happy saying: You guys aren't currently  
21 making a product. I think it is fair to say: Why are you  
22 not? I believe that there is infringement we have to deal  
23 with first.

24 But I don't even care to talk about we intend to go  
25 commercialize, and we are going to set up a factory here or

1 something like that. I have no intention of doing any of  
2 that.

3 Again, my issue is simply I don't want my guy to  
4 look dishonest because we didn't cover something on direct  
5 and then come back and cross them with the implication that  
6 trial lawyers make that, oh, you didn't want the jury to know  
7 X. That's why I really want to know exactly where the lines  
8 are.

9 I think it would be fair for him to say -- he is  
10 not ashamed of this at all to say we formed the company in  
11 Tyler, and we can say the date we brought the suit, which is  
12 what Mr. Post is saying he wants to say.

13 If we are going to start talking about zero  
14 employees, there is no purpose of that other than to suggest  
15 to a jury, wait a minute, what is this all about company?  
16 You have got a company with zero employees.

17 And then showing that that is part of the normal  
18 fabric of corporate structures, becomes relevant. I don't  
19 think either of us need to go there. But I am happy to just  
20 put in the facts about when the company was formed in Tyler  
21 relative to when the suit was filed. And I think we could  
22 all just be comfortable with that.

23 MR. POST: I think to the extent there is a  
24 suggestion that there are plans or things in motion to  
25 commercialize, I think it would be relevant to say: And

1 there is nothing that actually has been done in Tyler to do  
2 that? If that doesn't go there and that door is not opened,  
3 then we do not need that, and we would fine with just the  
4 basic facts; the when and why.

5 THE COURT: Okay. I think that this is just one of  
6 those -- this may be just one of those scenarios where we are  
7 going to have to see what happens on direct.

8 But I think you are right, you know, that if you  
9 don't wade into we are working toward commercializing our  
10 product or, you know -- or on that side of things, I think as  
11 Mr. Post said, they are not going to wade into but you don't  
12 really have any employees and you don't really make anything  
13 and that sort of thing.

14 Whichever one of you opens that door first, I think  
15 the other one is fair game to get into it.

16 MR. CALDWELL: My fear is actually what is going to  
17 happen is Apple is going to go there with some sort of  
18 cross-examination kind of thing. But I actually -- I don't  
19 want to hide any facts about this. I just want to be open  
20 with the facts, so I actually want to say here is when you  
21 formed the Tyler company, here is when you filed the lawsuit,  
22 and what are you doing? Well, right now we are dealing with  
23 this infringement suit.

24 I am not going to say anything about we are ramping  
25 up to release a product out of here or anything like that, so

1 I don't think anything there would open the hypothetical door  
2 we are talking about.

3 MR. POST: I think Mr. Albritton was saying, it is  
4 relevant that they don't make products. That is relevant to  
5 the Georgia-Pacific analysis. And I think to the extent that  
6 they make the argument that first we have got to take care of  
7 all these bad folks and then we can go ahead and move forward  
8 with our business, there are no steps that have been taken.  
9 I think that would open the door to the fact that there are  
10 no -- there is nothing happening in Tyler. There is nothing  
11 happening in the U.S. You haven't taken those steps.

12 THE COURT: Response?

13 MR. CALDWELL: If I open the door, I open the door.  
14 I mean, what I am trying to say is that I envision that I  
15 don't open the door because I am happy to acknowledge when  
16 they came to Tyler, happy to acknowledge when the lawsuit was  
17 filed, and then I will say what is happening is that they are  
18 dealing with infringement in this lawsuit.

19 And if I want to go say, guess what, we are going  
20 to get into product development and go down that path, then,  
21 sure, I am opening up the door on what questions of what  
22 steps have you taken towards commercialization. I agree with  
23 that. I just -- I intend to do the former and not the latter  
24 unless, I guess, there is something that necessitates a  
25 change. But I understand that the latter comes with the door

1 opening.

2 THE COURT: Okay. All right I feel like y'all are  
3 close. We already had a quasi-agreed and a ruled-on MIL, but  
4 it sounds like we have opened the door -- for lack of a  
5 better pun -- to new issues that may be -- but you are close,  
6 and I feel like you can work on an agreement. We have been  
7 going about an hour and 40 minutes, so we are going to take a  
8 15-minute break.

9 I want to see if y'all can reach some sort of  
10 agreement on what you are and are not going to go into, and  
11 we will take it up when we resume.

12 We will be in recess.

13 (Recess was taken at this time.)

14 THE COURT: Please be seated.

15 So we are going to press on for about 20 minutes,  
16 and then we will break for lunch so I can take up the  
17 criminal matters.

18 Let's hear a good report.

19 MR. POST: All right. So we did talk further about  
20 this over the break and weren't able to reach complete  
21 agreement, so here is where we are.

22 I think we both agree that the fact of when the  
23 Tyler office was open and when Smartflash elected to bring  
24 suit, are fine.

25 We think we should also be able to elicit the fact

1 that there are no products that are being made and are  
2 comfortable leaving it at those three facts.

3 I think Smartflash's position is that last fact  
4 would open the door to them eliciting testimony that the  
5 reason Smartflash isn't commercializing anything is that it  
6 has to deal with this infringement first.

7 And our position is that, well, if that is the  
8 response, then we should be able to respond that there are no  
9 employees at Smartflash.

10 I think we are going to say -- not tie it to Tyler  
11 in any way, just that there is no -- Smartflash has no  
12 employees period.

13 And I think Mr. Caldwell's position is if that is  
14 the fact, then the next fact is that Apple has entities  
15 somewhere that have zero employees.

16 We don't think that that last fact is a door that  
17 is opened. I don't know that any specific entity has even  
18 been pointed to. I know there is repeated mention about  
19 Ireland. The Irish entities have employees. There is over  
20 3,000 of them right now.

21 And Apple as a company has tens of thousands of  
22 employees. That doesn't seem to be related to at all the  
23 fact that Smartflash has none. And that is, we think, a  
24 relevant fact for the jury to consider. They can then  
25 evaluate is the reason Smartflash has no products because of

1 the infringement or because they have no employees.

2 THE COURT: Why is that relevant?

3 MR. POST: We think that is relevant to -- if they  
4 are going to say that they have to first deal with this  
5 infringement, these bad actors before they can do anything,  
6 we just think it is relevant that there have been no steps  
7 taken and leave it at that.

8 The jury can decide whether that is the reason why  
9 there is no products or whether that is the alleged  
10 infringement.

11 THE COURT: But that is in response to your option  
12 to wade into this notion that they don't make any products,  
13 right?

14 MR. POST: Well, I think that the commercial  
15 relationship between Smartflash and Apple is relevant to  
16 damages.

17 MR. ALBRITTON: It is a specific factor under  
18 Georgia-Pacific.

19 MR. POST: So that is why that fact is different  
20 than the panoply of other facts that seem to be falling out  
21 of doors that are opening. We would be comfortable with  
22 those three. We think that those --

23 THE COURT: I am going to extend it to the fourth,  
24 and then we are not going to ask about zero employees. That  
25 is where the line is. Okay?

1 All right.

2 MR. ALBRITTON: One last thing, Your Honor.

3 THE COURT: Yes.

4 MR. ALBRITTON: You talked to us about those  
5 exhibits.

6 THE COURT: Yes. Which ones?

7 MR. ALBRITTON: Well, you had said -- yeah, a  
8 fairly ambiguous question there, right -- or statement, about  
9 the extension of exhibits.

10 THE COURT: Yeah.

11 MR. ALBRITTON: A couple of things on that. You  
12 asked if we could figure out what we needed. We can't do  
13 that right now.

14 THE COURT: I understand that, and that makes  
15 sense. I know you are going to need some time.

16 MR. ALBRITTON: Good.

17 And just so you know, they represented that there  
18 were umpteen-jillion exhibits in VirnetX. Actually, Apple  
19 only admitted 120 exhibits -- 121 exhibits in that case. And  
20 the plaintiff only 412.

21 And so, you know, just this -- as I tried over the  
22 break to kind of figure out what we need to add, I mean, we  
23 are two weeks from trial, Your Honor. It is going to be very  
24 distracting and difficult for us to go through and do all  
25 this because, you know, we weren't keeping track of had to

1 leave this one off the list to get to 400, had to leave that  
2 one.

3 So I would at least ask the Court to give them some  
4 extension but not to 750 for the reasons we talked about  
5 before. Maybe 500. But it really -- just the exercise of  
6 trying to go back and relooking at our exhibits in all of  
7 this, is going to be terribly prejudicial, Your Honor.

8 THE COURT: I toyed with that, asking you to come  
9 down to something under 750. And let me just get from you,  
10 what could you come down to, Mr. Cassady?

11 MR. CASSADY: Your Honor, I could guarantee we can  
12 get this thing down to 600. I would say that 400 admitted  
13 exhibits pretty much tells you I am not playing games. This  
14 is a set of exhibits we intend to admit, and we intend to put  
15 into trial.

16 So if I was at 600, you are talking about, what is  
17 that -- I don't have the number in my head right now. But  
18 you are talking about 60 to 70 percent of the listed exhibits  
19 being admitted, and that is significant.

20 THE COURT: All right. Get it down to 550.

21 MR. CASSADY: Okay. Thank you, Your Honor.

22 THE COURT: All right. I feel like we can  
23 accomplish one more bucket before the break.

24 MR. CASSADY: Is it our turn?

25 THE COURT: I think it is your turn.

1 MR. CASSADY: Our turn. Go ahead.

2 MR. SUMMERS: I think as far as the exhibits, based  
3 on the discrete disagreement as to the number of employees  
4 and Your Honor's ruling, there are a bunch of -- a number of  
5 exhibits that we can go ahead and agree to not preadmit.

6 There is six exhibits related to the Smartflash LLC  
7 formation and incorporation documents and --

8 THE COURT: Why don't y'all meet and confer about  
9 those over the lunch break and confirm that you can agree not  
10 to preadmit them unless you have already talked about it.  
11 But since I just ruled on that, why don't you deal with that  
12 over lunch.

13 MR. SUMMERS: We can absolutely do that, Your  
14 Honor.

15 So the next thing and this might, you know, be  
16 opening a big door as one of the -- our objections to a large  
17 chunk of these documents are the ownership-related documents.  
18 And that is -- you know, it depends on Your Honor's ruling as  
19 to whether it is going to be tried to the jury or not and  
20 whether Your Honor is going to resolve it now or not.

21 And even beyond that, I think it seems from the  
22 supplemental expert report of Dr. Becker that even if Your  
23 Honor doesn't let standing go to the jury and even if Your  
24 Honor agrees that it is not appropriate for that to be before  
25 the jury, there is still a bunch of Internet-Plc-related

1 valuation documents that Dr. Becker threw in in his  
2 supplemental expert report claiming to rebut Mr. Mills'  
3 report, but we don't agree that it is proper rebuttal.

4 But in any event we think those documents should be  
5 excluded, this 40,000-pound Internet Plc valuation. It is  
6 just highly prejudicial. It is unclear, you know, who came  
7 up with that number. It is five years before any patent was  
8 ever granted. And we just think any probative value,  
9 depending on what Your Honor does with the ownership issue,  
10 it is going to blow the door wide open as to speculating what  
11 this number means and how they should address it.

12 So we think any of those -- any of those types of  
13 documents and the documents related to that standing issue  
14 should not be admitted.

15 THE COURT: Okay. I understand this is kind of a  
16 difficult one to argue because some of these documents may  
17 just rise or fall with the Court's ruling, and we are working  
18 on it. So -- but, anyway, to the extent maybe we can flesh  
19 that out and say, yes, these are the documents that if the  
20 Court, you know, decides that we have standing and it is not  
21 going to the jury, then they are out and if the Court decides  
22 it is a jury issue, then they are in, then I think that would  
23 be helpful if there is a group of documents that we decide  
24 rise or fall with the Court's ruling.

25 MR. BATCHELDER: Your Honor, it may not be that

1 simple. I don't want to make it unduly complicated. But  
2 standing is ultimately a determination if the plaintiffs now  
3 own the patent rights.

4 The question here is when Internet Plc was  
5 evaluating the intellectual property rights, and it said --  
6 you know, it placed price tags on the value of its IP, and it  
7 really came in a couple of different contexts.

8 One is that there is Internet Plc's -- I think his  
9 title was managing director. His name was Melvin Simpson.  
10 He submitted these documents to the bankruptcy proceeding  
11 putting that 40,000-pound price tag on the intellectual  
12 property.

13 And then there were also communications from  
14 Mr. Racz directly to the liquidators associated with the  
15 bankruptcy making relative statements about the patents  
16 versus the trademarks and that kind of thing.

17 And we believe that the jury could conclude fairly  
18 that at that time Internet Plc owned the patent rights. That  
19 may be a different question from what is true today, or it  
20 may not be. But we do think that that is a fact question  
21 that the jury should be able to resolve because it is related  
22 to damages. They are going to have to make the damages call.  
23 At the end of the day that is a fact question. So we think  
24 those documents should be preadmitted.

25 And, again, it may or may not rise or fall with the

1 Court's standing ruling; but I don't think it does because,  
2 again, it is a damages question; and we think the jury should  
3 be entitled to conclude from the documents surrounding what  
4 was going on at the time, that Internet Plc owned the patents  
5 at the time.

6 THE COURT: And, therefore, what? How does that go  
7 to damages? And, therefore, they valued them, and that  
8 should be taken into account.

9 MR. BATCHELDER: Well, and, therefore, when  
10 Internet Plc was placing price tags on the value of  
11 intellectual property, that price tag would be relevant to  
12 the value of the patents.

13 THE COURT: Response?

14 MR. CALDWELL: Your Honor, I just want to -- I'm  
15 not going to take Mr. Summer's argument away from him. You  
16 were asking like, basically how does this fit in or relate to  
17 a category of documents. I think a couple of sentences out  
18 of Apple's standing brief actually help explain it.

19 If I could paraphrase and then I will read you  
20 their sentences. If I can paraphrase Apple's argument --  
21 first of all, there is standing, which the Court can clearly  
22 resolve and the Court can make factual findings and should.

23 What Apple's argument is, is essentially that if  
24 you conclude that you don't even have standing, then they can  
25 make an argument about damages using the Internet Plc stuff,

1 and they say as much in their brief.

2           They say: As discussed further below, if Internet  
3 Plc did, in fact, own the patents-in-suit, it did not  
4 transfer them to Smartflash, and Smartflash has no standing  
5 to bring suit.

6           Then after a sentence here, it says: If, as Apple  
7 maintains, the patents-in-suit were transferred to Internet  
8 Plc, then statements about the valuation of those patents  
9 during Internet Plc's insolvency proceedings are highly  
10 relevant to damages.

11           So, effectively, you would have to conclude that  
12 you don't have standing in the first place for them to be  
13 relevant. And if they were relevant, that is where you get  
14 to the extraordinary 403 situation even if they were relevant  
15 because what you have is, again, five years before any patent  
16 issued, before the patents here were even pending, that is,  
17 predecessors to predecessors, a lay liquidator who wasn't  
18 even certain he had title -- it turns out he didn't -- puts a  
19 value on it.

20           So -- anyway, basically we think the Court should  
21 resolve the threshold issue for standing, and it seems to me  
22 that maybe Mr. Batchelder is trying to kind of evolve what  
23 their position is now as to, well, it is still going to come  
24 in no matter what.

25           But the truth is -- I mean, throw the case out if

1       there is no standing. But the Internet Plc valuation  
2       documents aren't even relevant even by their own admission  
3       unless you decide that you need to throw it out.

4               THE COURT: Obviously, I saw that point raised in  
5       the response and I haven't -- there is not a reply coming in,  
6       so I would love to hear a response to that argument that you  
7       only get to the Internet Plc's valuation if, in fact,  
8       Smartflash didn't have standing because the stuff was  
9       transferred to Internet Plc.

10              MR. BATCHELDER: I think I understand Your Honor's  
11       question.

12              THE COURT: I'm not doing a very good job.

13              MR. BATCHELDER: But correct if not. The reason I  
14       said that it may or may not rise or fall is that Smartflash  
15       has never quite come out and said that, you know, if Apple is  
16       right if at the time Internet Plc owned the patents, then  
17       Apple would be right that there is no ownership here and  
18       there is no standing and the case should go away. They have  
19       never admitted that. And that is why I say intellectually  
20       there are two different questions.

21              One is whether plaintiffs now have the patent  
22       rights and can sue on them. The question for damages at the  
23       time when those valuations were made, did Internet Plc own  
24       the patent rights?

25              It is conceivable, I suppose, that the answers

1       could be different. But our belief is that if Internet Plc  
2       owned the rights at the time, the chain is title is broken  
3       and they don't have standing now.

4               THE COURT: All right. And if they don't have  
5       standing, then it doesn't really matter how Internet Plc  
6       valued the patents for this case because they don't have  
7       standing.

8               MR. BATCHELDER: I understand. That is Apple's  
9       belief. They have never admitted that. And so it just comes  
10      down to, I think, ultimately, you know, for this question  
11      about damages, the jury could decide conceivably if you find  
12      that there is standing, it is still possible under their  
13      theory, perhaps, that the jury could still decide that  
14      Internet Plc at the time owned the patents, and so that  
15      valuation could still be relevant. That is my only point.

16              THE COURT: Are you saying that?

17              MR. CALDWELL: We have never taken the position  
18      that if Internet Plc owned the patents at that time, we would  
19      have standing. So I guess the whole matter of things are in  
20      theory conceivable. We are not aware of any fact that would  
21      connect those dots.

22              In fact, that is why we made the point in our  
23      response that it is essentially a predicate that you need to  
24      find you don't have standing before this damages thing gets  
25      to -- gets to be relevant.

1           THE COURT: Okay. It sounds to me like then these  
2 documents will rise or fall with the Court's ruling on  
3 standing, and I am hopeful that this afternoon maybe we will  
4 have -- I have been through all of the briefing but because  
5 of the lateness with which this was teed up, I would like to  
6 hear some argument on it and let you-all have a chance to  
7 reply to the response, et cetera.

8           So, anyway, so all of that to say I'm not going to  
9 rule on those exhibits because I'm going to rule that they  
10 will rise or fall with the Court's rule on standing.

11          MR. CALDWELL: Yes, Your Honor.

12          THE COURT: It is 11:15. I don't know that we can  
13 really properly wade into another one of these before I need  
14 to break for my criminal matters.

15          So what we are going to do is break for lunch until  
16 1:00 o'clock. I think I will be well done with the criminal  
17 by then. And I would just encourage the parties to, please,  
18 while you are eating find the time to meet and confer in  
19 light of the rulings that we have been through and see if  
20 there is not anything else you can reach agreement on in the  
21 interim. And, otherwise, we will pick back up after lunch.

22          We will be adjourned -- recessed.

23          Oh, I'm sorry. If you-all would kind of clear out.  
24 I'm going to have criminal attorneys that need to use counsel  
25 tables. I need you to stack things. I'm sorry to ask you to

1 do that. They are going to have to get in here.

2 MR. BATCHELDER: No problem.

3 (Recess was taken at this time.)

4 THE COURT: Hello. Please be seated.

5 All right. Welcome back. Okay. Let's continue.

6 Let me just get an idea of what all we have left.

7 How many groups of objections do we have left?

8 (Pause in proceedings.)

9 THE COURT: Not everybody at once.

10 MR. ALBRITTON: About five on our side.

11 THE COURT: Okay. Five over here.

12 MR. PEARSON: We have got about five groups --

13 depending on how you count it, we have around five groups for  
14 trial exhibits.

15 THE COURT: All right. Well, let's get started.

16 MR. ALBRITTON: Is it our turn?

17 THE COURT: It's your turn.

18 MR. CASSADY: Your Honor, I don't think we finished  
19 the ownership issue.

20 THE COURT: Oh, are we still on that?

21 MR. SUMMERS: Well, we discussed it a little bit  
22 and there is a little bit of disagreement on what is and what  
23 is not rising and falling with the Court's ruling on  
24 standing.

25 THE COURT: Okay.

1           MR. SUMMERS: So there is -- Your Honor, there is  
2 one sub-bucket of documents, if you will, that is related to  
3 the Internet Plc liquidation. And these are the exact  
4 documents that I was talking about when we were talking about  
5 the ownership issue and this 40,000-pound issue and these  
6 liquidator documents and series of emails that is cited all  
7 up and down the standing briefs.

8           And, apparently, we are at a disagreement as to  
9 whether those documents, those liquidation documents and that  
10 40,000-pound figure rises or falls with the ownership issue.

11          THE COURT: Okay. So why else might they also be  
12 relevant?

13          Defendants?

14          MR. SCHENKER: Your Honor, some of these  
15 documents -- I mean, the liquidation and the facts of  
16 liquidation also go to Internet Plc, which is the  
17 predecessor-in-suit or predecessor entity related to the  
18 predecessor entity of the plaintiffs, their efforts to  
19 commercialize the inventions and their efforts to -- and  
20 their failure at commercialization of these inventions and  
21 the relevance for those purposes as well.

22          THE COURT: All right.

23          MR. BATCHELDER: If I could add to that, Your  
24 Honor. Excuse me. Just to be clear, there are also some --  
25 some of those documents -- I assume they fall in this bucket,

1 but I am not dead certain, where Mr. Racz himself is talking  
2 about the patent rights in suit, so he is explicitly saying  
3 as to these patents I think they have this value. One time  
4 he says they have no realizable value. Another time he says  
5 they are less value than the trade name, so that kind of  
6 thing.

7 That has nothing to do with standing. That is his  
8 direct commentary on the value of the patents. That, I  
9 think, is clearly relevant to damages as cited in our damages  
10 report. That has to come in, so I just want to be clear  
11 about that.

12 THE COURT: Relied on by your expert. When were  
13 these emails? Are they around the time of the hypothetical  
14 negotiation?

15 MR. BATCHELDER: They were even before it actually.  
16 They are 2003-ish.

17 MR. SUMMERS: June of 2003, Your Honor. It is  
18 right as this liquidation is going on, right when all of  
19 these 40,000-pound emails are going on, right when the emails  
20 about patents held by Smartflash Limited. There is no way  
21 that this stuff can come up without just blowing the  
22 ownership door right open.

23 And the fact about Dr. Becker relying on them, I  
24 believe it is correct that they have already agreed that that  
25 extra portion of Becker's report rises and falls with

1 ownership where these documents are cited. So I don't  
2 understand what the disagreement is here.

3 And they can correct me if that understanding is  
4 incorrect, but these documents are six years before the  
5 hypothetical negotiation. There is no patent. It is just a  
6 patent application. We don't know -- it is impossible to  
7 sort of sort out what all these documents mean, and they are  
8 highly prejudicial.

9 MR. BATCHELDER: On the last point, the application  
10 existed to which all of the patents-in-suit claim priority,  
11 so every claimed invention that is now claimed in the claims  
12 of the patent-in-suit was disclosed in this priority  
13 application. And the named inventor Mr. Racz was commenting  
14 on the value of that application and all of the disclosed  
15 inventions. It is clearly relevant to damages. There can be  
16 no doubt about that fact.

17 MR. CALDWELL: Your Honor, if we want to talk about  
18 the relevance of those, as Mr. Summers says, they were six  
19 years before the hypothetical negotiation, five years before  
20 a patent issued.

21 And what Mr. Racz was talking about is he is saying  
22 things in emails like if these stay in Smartflash Limited  
23 when that company is stricken from the record, I have zero  
24 doubt that the receiver is going to keep alive the  
25 applications and do what he needs to do.

1           And if somebody else were to buy them, and I don't  
2 know who this person is and they were disassociated, and they  
3 would have no realizable value without -- and it all relates  
4 to standing. It has literally nothing to do with what kind  
5 of claims might issue and ultimately did issue five years  
6 later, what might infringe. It has no bearing on the  
7 hypothetical negotiation whatsoever.

8           MR. BATCHELDER: My last word on this, Your Honor.  
9 When Mr. Racz says, for example, the trade name Internet Plc  
10 is more valuable than the patent rights, he is talking about  
11 these patent rights explicitly. There is no issue about  
12 standing or whether these are owned by some entity or not.  
13 He is talking about these patent rights.

14           They want to criticize the fact that subsequent  
15 patents hadn't yet issued; and that he is only talking here  
16 about the priority application that discloses all of these  
17 inventions. That goes to the weight and not admissibility.

18           MR. CALDWELL: No patents had issued. He was  
19 saying there was a great chance no patents will issue if the  
20 thing goes to a receiver and nobody even keeps it alive.

21           Again, I think Your Honor's question hit the nail  
22 on the head. It literally has no bearing on the hypothetical  
23 negotiation, in which case he possesses a patent, he has  
24 claims, you know what the claims cover, and you are having  
25 the hypothetical negotiation on the value at that point.

1           THE COURT: All right. I am going to hold those,  
2 to the extent they would be admissible, they rise or fall  
3 with my ruling on standing. They are not going to be  
4 admissible on this other issue of damages apart from that.

5           So -- and I apologize that we haven't been able to  
6 get you a ruling on that earlier. I know that would flesh  
7 out some of these issues, but we are paddling as fast as we  
8 can, so...

9           MR. SUMMERS: I completely understand that, Your  
10 Honor. So we have got a couple of other things that we  
11 thought may have been agreed as a result of the ownership  
12 rising and falling that apparently aren't.

13           There are some -- four exhibits about -- actually,  
14 I take that back, Your Honor. I thought -- these would be  
15 agreed as it relates to Your Honor's ruling as to, you know,  
16 the four facts that could be said and all of the other  
17 corporate structure trust stuff being out.

18           There are four documents about a royalty interest  
19 agreement, which is an agreement between the BBI company and  
20 Smartflash LLC, and it talks about, you know, infringers and  
21 other litigation; and so we think that would fall under a  
22 whole bunch of MILs, and we object to that.

23           THE COURT: Let me see the document. Let me hear  
24 the arguments on it. We are at the point where I need to  
25 make some rulings on some actual exhibits, so --

1 MR. SUMMERS: Thank you, Your Honor. It is  
2 Defendant's Exhibit 181.

3 If you'd zoom in a little bit.

4 And, Your Honor, this is just one of the several  
5 agreements between Smartflash Technologies and Smartflash LLC  
6 that arose prior to the lawsuit being filed. It was signed  
7 at the exact same time as the agreements we talked about  
8 earlier with that 2.25-billion figure. So if Your Honor is  
9 going to exclude that 2.25-billion figure, I don't understand  
10 why this agreement would also be in.

11 Again, we don't think it is relevant to anything,  
12 and it just goes into the relationship between the two  
13 companies and whether the structure is incorrect or nefarious  
14 in any way.

15 So that is document 181, and there are three  
16 more -- they are not agreements but they are Smartflash  
17 Technology, Smartflash LLC financial statements. And that is  
18 exhibits -- Defendant's 191.

19 Could you scroll down, please?

20 This is just a financial statement of, I believe,  
21 Smartflash LLC. And, again, Your Honor, I don't really  
22 understand what this goes to. It is just -- I don't believe  
23 Dr. Becker relied on it. It is cited in his materials  
24 considered, but it is just a bunch of financial information  
25 about Smartflash LLC. I don't see how that is relevant.

1           And 218 and 219 are similar except they are  
2 Smartflash Technologies' financial statements.

3           Then there is Defendant's Exhibit 234.

4           Which if we could pull that up.

5           That is just an email -- as soon as it gets here.

6           An email about an investment in Smartflash  
7 Technologies and a potential investor. I believe we have an  
8 agreed MIL about ownership interest in Smartflash  
9 Technologies and Smartflash LLC, so we don't really  
10 understand why this document would not be under that  
11 agreement.

12           THE COURT: Okay. Response?

13           MR. SCHENKER: Your Honor, these --

14           THE COURT: If you would take the podium, that  
15 would be great.

16           MR. SCHENKER: I'm sorry.

17           THE COURT: All right. Mr. Schenker, go ahead.

18           MR. SCHENKER: As we said, these documents were  
19 cited by our expert in his damages report. You know, they  
20 went to his conclusions ultimately as to what his damages  
21 numbers -- what the appropriate damages numbers, what they  
22 should be and why.

23           THE COURT: He called them out, he talked about  
24 them and how they impact his valuation of the patents?

25           MR. SCHENKER: To be honest with you I can't tell

1 you on the spot how and where they were cited in the report.  
2 I don't have the specifics on these. And I don't know that  
3 report as clearly.

4 THE COURT: Tell me why -- just tell me why you  
5 need them then.

6 MR. SCHENKER: I mean, I would say we need these.  
7 Basically, they support in terms of the valuation of what  
8 these patents should be, the valuation of what the companies  
9 believe these patents were at.

10 THE COURT: How are these different than the  
11 2.2-billion-dollar agreement that you said was really not  
12 probative of the interaction between these two companies?  
13 They can put whatever number down. But it seems like these  
14 numbers are better for you, and so you would like to have  
15 them in.

16 MR. SCHENKER: Because the other numbers when it  
17 relates to a sell of the patent, again, some of that is based  
18 on the deposition testimony of Smartflash's own witnesses  
19 that the -- that there was no hypothetical negotiation.  
20 There was no negotiation at all between the Smartflash Tech  
21 and Smartflash LLC in signing that promissory notice and  
22 putting that out. When the questions were asked where did  
23 that number come from, advice was taken, advice was taken by  
24 counsel, advice was taken from, you know, firms. And a lot  
25 of road blocks were put up there.

1           Basically, what we were told is, yeah, we came  
2 up -- we needed a number and we put together a number, and it  
3 is a really big number, and it makes it look really good.

4           These, on the other hand, are financial statements  
5 by the entities talking about presumably the actual value of  
6 their finances as they go.

7           THE COURT: All right. I am going to exclude  
8 those.

9           But, defendants, you are up, so -- on your next  
10 bucket.

11          MR. ALBRITTON: Hi, Your Honor.

12          THE COURT: Hi.

13          MR. ALBRITTON: Very small disagreement here.  
14 Mr. Cassady and I at the last hearing told you that the  
15 defendants would only be talking about the apportioned base;  
16 that they would not be talking about total revenue.

17          So we have had some followup discussions with  
18 regard to that, and we agree that they can talk about the  
19 number of units. We agree that they can talk about the base  
20 as they had it apportioned. We agree that they can talk  
21 about the sales price of the devices. We agree that they can  
22 talk about the profit margin.

23          Okay. We also agree they can't use any of those  
24 constituent parts to calculate or suggest the overall revenue  
25 base.

1           The additional agreement we have is they can  
2 say -- they can describe their methodology to have come up  
3 with the apportioned base. So they can say we took some  
4 revenue numbers, we took these answers to these questions,  
5 and this is how we came up with this apportioned base.

6           The only problem is -- the only dispute is they  
7 want to be able to say that they apportioned that -- that  
8 that base is 25 percent of the total revenue. And, of  
9 course, if you tell the jury that that base is 25 percent of  
10 the total revenue, then you are telling them --

11           THE COURT: You are telling them the total  
12 revenue.

13           MR. ALBRITTON: -- the total revenue is four times  
14 that. So that is our only dispute.

15           One other thing that we agree about that we should  
16 just be clear on the record is that they won't make any  
17 arguments or suggestions that come up with an effective rate.

18           So, like, for instance, they can't say, you know,  
19 since we are using this apportioned base, instead of asking  
20 for one percent of the price of the phones -- or of the base,  
21 we are effectively only asking for a quarter of a percent or  
22 we are only asking for, you know, this minute portion of the  
23 overall revenue; things of that nature.

24           So it is just that very one discrete problem where  
25 they want to effectively tell the jury what the overall

1 revenue is.

2 THE COURT: Okay. Response?

3 MR. CASSADY: Your Honor, part one of the  
4 agreements are right. Mr. Albritton and I -- we worked it  
5 out, and we kept going back and forth to try to get this  
6 right, and we agreed that we can talk about the price of each  
7 product and the total number of units and the other various  
8 issues that he went through.

9 And I agree that I am not going to -- and we all  
10 know it probably will be me -- I will not be going into  
11 comparing the damages award as a percentage against the total  
12 revenue. I am not going to do that. It is just in direct  
13 violation of Uniloc and I agree.

14 The issue of what Mr. Albritton said, which is  
15 basically they have agreed that we can tell the jury that our  
16 apportionment is a percentage of the base, but that is it.  
17 We can't tell them anything else.

18 The problem with that is this entire damages case  
19 is going to be about them saying we didn't apportion the  
20 base; and that our questions don't properly apportion the  
21 base from the survey. And for us to not be able to tell the  
22 jury the percentage that we actually use to apportion the  
23 base, is kind of nonsensical. We are not allowed to show our  
24 work.

25 I understand that a juror may decide to go back

1 there and run the numbers. A juror may decide to go back  
2 there and Google the numbers. But at the end of the day, you  
3 are talking about moving steps away from Uniloc.

4 Uniloc was don't say the overall damages figure and  
5 compare it to the total revenue and compare it to your  
6 damages asked. We are not going to do that. We are going to  
7 say we apportioned the base -- here is the total revenue and  
8 we apportioned it to this, which is 25 percent. I'm not  
9 going to say that total number.

10 The revenue figure that I will say is the  
11 apportioned revenue figure. But I don't see how we are going  
12 to have a case about apportionment and about the question of  
13 apportionment where I can't tell the jury this is the  
14 percentage I used because, I mean, Mr. Albritton is going to  
15 get up -- he is a smart lawyer -- he is going to get up and  
16 he is going to say they have got touch screens, they have got  
17 cameras, they have got -- and he is going to list hundreds  
18 and hundreds of features out; and I am going to be  
19 debilitated because all I can say is, well, we took a  
20 percentage of the whole.

21 And the jury is going to be like, well, what  
22 percentage did you use? And Your Honor knows, I mean, the  
23 Daubert in this case was about the very percentage, the very  
24 question of motivation. And that is the question we are  
25 dealing with here.

1           So I understand that a studious juror could go and  
2 do those things. But that is not the prejudice issue of  
3 Uniloc. Uniloc is about expressing those large numbers in  
4 comparison to a damages asked, and basically that comparison  
5 and that continual comparison is unable to correct. You  
6 can't correct it. The jury starts believing otherwise.

7           So my issue here is that I can't show my work if I  
8 can't say that percentage. And they are not going to agree  
9 not to cross my witness on that percentage, and so then I  
10 am -- I don't even know how to say it.

11           For instance, Your Honor, in your order you noted  
12 that we said 80 percent. 80 percent is not even in there.  
13 80 percent of the devices are not even in there. Under what  
14 he is saying, I can't say that. I can't tell the jury that.

15           I mean, that just kind of shocks the conscience. I  
16 can't tell the jury that 80 percent of the devices are gone,  
17 and the revenue you are looking at from the 20 percent of the  
18 devices left over. That is a critical issue, Your Honor.

19           If we can't tell them, we can't show the homework,  
20 then basically we can't do our analysis, so that is what is  
21 happening there.

22           MR. ALBRITTON: Your Honor, the fight is over the  
23 methodology and what the survey showed and how it did it. It  
24 has nothing to do with the percentages. We are not going to  
25 cross their expert about the percentages. We are going to

1 cross them about the methodology and if it is proper to  
2 apportion based on the results that they got.

3 So there is no reason to get into the specific  
4 percentage. All it does is, you know, tell the jury  
5 everything -- put up to the jury everything that the Fed  
6 Circuit says you shouldn't do, the things that they say are  
7 overly prejudicial. It is just the back-door way, whether  
8 intended or not, into the overall revenue figure.

9 Therefore, there can be ample cross with respect to  
10 what they can do -- address, all of the cross-examination  
11 with respect to the methodology; and if for some reason we  
12 are dumb enough to get into the percentages, they can  
13 approach, the door will be opened, and it will be our own  
14 fault.

15 But there is no necessity of them to talk about the  
16 percentages, Your Honor.

17 THE COURT: Doesn't that methodology require them  
18 to show how they got their numbers?

19 MR. ALBRITTON: It does not require them to show  
20 the percentages. All they have to do is say that we asked  
21 these questions, we got these results; and based on these  
22 results, we took a percentage of the revenue. There is no  
23 necessity of showing that.

24 We further, Your Honor, we don't quibble with their  
25 math on that. We quibble with the methodology, but we are

1 not going to attack anybody. In fact, we will stipulate that  
2 their math was appropriate -- or not flawed.

3 THE COURT: You know, Mr. Cassady raised that line  
4 of questioning that you are going to get up and say, yeah,  
5 but you didn't -- you know, the phone has a screen and the  
6 phone has this and the phone has that; and their response is,  
7 yeah, we took that into account in our apportionment. And  
8 that is why they want to be able to say with what  
9 apportionment is, so how do we get around that?

10 MR. ALBRITTON: Well, the surveys discuss a variety  
11 of issues. And all of that is going to come in without  
12 getting into what the specific percentage is. He is  
13 certainly right, under Factor 13 everybody agrees -- they  
14 even agree -- that these other issues are irrelevant to  
15 apportionment. But none of those things required them to say  
16 what the actual percentage of apportionment is.

17 THE COURT: Response.

18 MR. CASSADY: Your Honor, Uniloc doesn't say you  
19 can't give a jury any concept that allows them to ever figure  
20 out anything about total revenue. It says you can't go in  
21 front of the jury and give them the total revenue figure and  
22 compare it to your damages asked. That is what that holding  
23 is. That is the extent of that holding.

24 And we are agreeing that we are not going to go  
25 into those two issues. We are not going to tell them the

1 total revenue, and we are not going to compare it to our  
2 damages asked. We are not going to do that.

3 So what is happening here is the implication will  
4 be given the royalty base we are going to have, the  
5 implication is it has got to be everything. That has got to  
6 be everything regarding some high percentage of everything  
7 because the jury is going to hear we didn't take into account  
8 a whole lot of issues.

9 And then Mr. Mills is going to say, no, but I took  
10 a percentage of this as my apportioned base. And the jury  
11 is -- there is no way a jury is going to understand that  
12 40-billion dollars is not all of their revenue. That is just  
13 not going to happen, so that is what is trying to be built  
14 here is the reverse of Uniloc. It is the insinuation that we  
15 are using all of it or some large portion of it. So what is  
16 happening is we can't explain to the jury our  
17 apportionment.

18 I don't understand kind of the parts of what the  
19 trial would be about here about the issue for damages if we  
20 can't tell them it is 15 percent for movies, it is 25 percent  
21 for apps, it is 8 percent for books. If we can't tell them  
22 that, I don't understand how -- every cross they have, I am  
23 debilitated and I can't respond to it.

24 And I am not going to say the total revenue. I am  
25 not going to say those things. I get it. But, I mean, at

1 the end of the day Uniloc does not stand for the position  
2 that you have to put the jurors in the dark on any issue that  
3 they move within two steps of total revenue.

4 And that is what is being asked here. They are  
5 trying to extend Uniloc a lot further than it goes.

6 THE COURT: What kind of exhibits are we talking  
7 about here? I mean, I see the general testimony; but what  
8 are the exhibits at issue in this bucket, what kinds of  
9 things?

10 MR. CASSADY: I'm not sure -- well, Your Honor, I  
11 think we have all agreed we are taking Mills' summary  
12 exhibits, and we are going to redact out the total revenue  
13 portions that he is using to calculate. Then that will be  
14 removed and now the rest of the steps will be there.

15 So he'd say "alone motivated" was 26 percent of  
16 devices. That number would stay there. And that way you  
17 could tell the jury 74 percent of the devices aren't in  
18 here. So the revenue you are seeing is related to 26 percent  
19 of the devices or 25 percent of the devices.

20 So it is not in the context of -- so, yes, somebody  
21 that is astute could look at it and try to figure out the  
22 calculation; but, Your Honor, I tell you, I don't know that  
23 there is any case where some juror couldn't, after hearing  
24 the number of units that is out there and the price -- and  
25 that is the more telling part, Your Honor. They have agreed

1 to price, and they have agreed to units, so the jury can  
2 figure that out, too. They can take the number of units  
3 times the price, and they can figure it out just as easily as  
4 they can this percentage.

5 So what is really happening is they are trying to  
6 lock me down on a very important issue to them as far as  
7 crossing my witness on apportionment, and make it where I  
8 can't defend myself. But they are happy for the jury to talk  
9 about the number of units times the price. That is not  
10 really their issue. They are trying to extend Uniloc so they  
11 can cross my witness without him being able to respond.

12 THE COURT: Response?

13 MR. ALBRITTON: Briefly, Your Honor.

14 This is not just a Uniloc issue, Your Honor. If  
15 you recall Lucent, there is a whole series of cases that  
16 caution against giving this sort of information to juries and  
17 the effect of it. And there have been cases reversed based  
18 on this very point. So it is not merely a Uniloc issue.

19 Secondly, we are not going to insinuate that this  
20 is only -- Mr. Cassady seems to have some concern that we are  
21 going to insinuate that this is close to all of the revenue  
22 or all of the revenue. Again, that is certainly not our  
23 intention. If we do that, we have opened the door to that.

24 The last thing, it makes it hard to really try to  
25 work out deals here because they come back and use it against

1 you. In an attempt to get this narrowed down for the Court,  
2 I agreed last night to revenue -- I am sorry. I agreed to  
3 the units and the sales price.

4 And now they are saying, well, look, he has agreed  
5 to this. They can do all this complicated math. You know, a  
6 jury or jurors going out and figuring out all these big unit  
7 numbers times the various prices of the devices is  
8 fundamentally different than telling somebody 40 billion  
9 dollars is a quarter of the whole base.

10 And so, you know, that is where we are, Your Honor.

11 THE COURT: Okay. Final word.

12 MR. CASSADY: Your Honor, I don't know how to tell  
13 a jury that the units in the base or the devices that were  
14 alone motivated and have them have any perspective on what is  
15 being left on the table.

16 It is in your order, Your Honor, about the 80  
17 percent. I can't tell the jury about the 80 percent?

18 THE COURT: I mean, is that it, you can't tell the  
19 jury you left 80 percent? I mean, I'm having a hard time  
20 getting my head around the concrete evidentiary issues that  
21 are coming in. I mean, I hear big global arguments. What  
22 are the exhibits?

23 MR. CASSADY: What I am hearing is I can't tell the  
24 jury Wecker's -- Dr. Wecker, our survey expert's percentage.  
25 I can't tell the jury the percentage from the "alone

1 motivate" question is what I am hearing. I can't tell the  
2 jury what that percentage is and have it understood that when  
3 Mills takes that percentage for "alone motivate" that his  
4 revenue base, his apportioned base is just the revenue  
5 related to that. He is saying I can't do that.

6 MR. ALBRITTON: We don't mind saying that Dr.  
7 Wecker came up with 20 percent. It is the further step of  
8 connecting the dots, Your Honor.

9 MR. CASSADY: But they are going to cross Dr.  
10 Wecker on that 20 percent, and they are going to cross Dr.  
11 Wecker on that survey question and say it is inappropriate  
12 and do all those things like that. And when Mr. Mills gets  
13 up, he can't -- he can't connect the dots that he is  
14 excluding this 80 percent, and he can't connect the dots.

15 They have no case that says this. They have cases  
16 that say I can't tell them the total revenue. They don't  
17 have cases that say you can't have information in a record  
18 that allows a jury to figure it out. It is just not there.

19 MR. ALBRITTON: We are not going to fuss with Dr.  
20 Wecker about whether 20 percent of the responses or 30  
21 percent -- there is going to be no fuss about the math, Your  
22 Honor. It is about the fundamental methodology of trying to  
23 apportion the base and the flaws with the question. It is  
24 has nothing to do with the math.

25 MR. CASSADY: Your Honor, then why did they Daubert

1 Mills if it is a flaw in the methodology of the survey? They  
2 tried to Daubert both of them on that exact issue. And Your  
3 Honor found that Wecker's survey was fine, and that Mills had  
4 issue -- you know, we, respectfully, disagree -- but Mills  
5 had issues with his question.

6 And so how -- what they are saying is Mills can't  
7 say I relied on that 20 percent to identify the apportioned  
8 base. They are saying he can't do that. That is what they  
9 are saying. And that is ultimately the calculation.

10 So, I mean, it is really shocking to me that we  
11 might be in a scenario where Mr. Mills gets up and literally  
12 can't show his work. He is not going to show the total  
13 revenue, but he can't show his work, and this entire case is  
14 going to turn into cross-examination about that percentage.  
15 That is exactly what this case is about.

16 THE COURT: All right. I'm going to overrule that  
17 objection. I wish I had some context for the kinds of  
18 exhibits that this is letting in though. I would love to see  
19 what kind of things are in this bucket.

20 MR. CASSADY: Your Honor, I'm not sure the  
21 exhibits -- I'm not sure the exhibits really are what is  
22 controlling this. I think this really is testimony.

23 THE COURT: Okay.

24 MR. CASSADY: I think there are exhibits that  
25 have -- but we already agreed we are going to redact out

1 those numbers, and then the percentages may stay around in  
2 those exhibits, but -- yeah.

3 THE COURT: Okay.

4 MR. CASSADY: Thank you, Your Honor.

5 THE COURT: All right. What is next?

6 MR. CASSADY: Is it our turn? Okay.

7 Your Honor, I just wanted to complete one other  
8 subissue that is related to Apple licenses that also relates  
9 to Apple policies and Apple patents. This one should be, I  
10 believe relatively quick, Your Honor.

11 With regards to the prior art -- or sorry, with  
12 regards to the patents, Your Honor, said the patents are out.  
13 I assume does that mean Your Honor, the MIL was that those  
14 patents won't be discussed even though the exhibits are not  
15 in?

16 THE COURT: Right. I mean, is there -- refresh my  
17 memory. Is there also a pending MIL that I carried --

18 MR. CASSADY: Yes, we filed a MIL, Your Honor,  
19 about their discussion about patents. So I guess what I  
20 would tell Your Honor is we are fine with them saying we are  
21 Apple, we have patents, we are innovative. Even their guys  
22 that get on the stand can say we have got patents. That's  
23 fine. But just not patents in this field, not patents about  
24 the accused feature, not patents in the space. That is what  
25 our big issue is.

1 THE COURT: Okay. Response?

2 MR. BATCHELDER: Thank you, Your Honor. So for a  
3 given witness, Mr. Cassady just said -- excuse my voice -- a  
4 given engineer could say I have got patents in my name. We  
5 do think it is appropriate for a given witness to say, my  
6 group worked on this particular area iTunes and our group has  
7 X number of patents emanating from that work. I understand  
8 Your Honor said we can't get into the specific patents and we  
9 can't introduce those exhibits. That's what I understand the  
10 ground rules are.

11 THE COURT: That's right.

12 Does that -- Mr. Cassady, that is where I  
13 understand my own ruling is as well.

14 MR. CASSADY: Your Honor, that is fine, as long as  
15 it is about the group, not about we have this -- iTunes is a  
16 general, overall concept -- to say movie purchases on iTunes.  
17 You see what I am saying? That is where this case is. So if  
18 it is their group, I think we are fine there.

19 THE COURT: All right.

20 MR. CASSADY: So, Your Honor, on that same thing,  
21 is the motion in limine -- that same motion in limine was  
22 also a motion in limine regarding the use of licenses that  
23 Apple had that they contend was to prior art or was to prior  
24 art that they have in this case. There is long argument in  
25 the last hearing -- Mr. Curry and my colleague argued it --

1 we didn't get a ruling from the Court on that one. I can  
2 walk back through it.

3 What it is, Your Honor, is that there are some  
4 prior art references they have that they have a license to.  
5 In the context of the depositions of their licensing witness,  
6 this is the one where their licensing witness claimed  
7 privilege if we asked them whether or not they practiced that  
8 patent.

9 So now they get to have the best of both worlds.  
10 They can come in and tell the jury we have a license to that  
11 prior art patent; but now the jury doesn't get to hear all of  
12 the background of whether they practiced it, whether they  
13 though it is invalid, whether they said it wasn't infringed,  
14 whether after some time they changed their mind and signed a  
15 license because they believed it was infringed. All of that  
16 stuff is kind of gone because the prior art -- or because of  
17 the privilege objections.

18 So we have no way to cross-examine on that. They  
19 didn't produce any of the information related to these  
20 licenses from those lawsuits that those licenses came from or  
21 any contentions they had about those things, and that is  
22 where you get into the satellite litigation issue. We are  
23 going to talk about -- we have to talk about all those  
24 things, and we are unarmed. We don't have any discovery  
25 about any of that stuff.

1           And we don't have -- we have got privilege  
2     objections as to, for instance, Intertrust. I asked straight  
3     up: Do you guys practice that patent? And Risher, Jeff  
4     Risher, the licensing witness, said privileged when answering  
5     the question.

6           Then they will get up here in front of the jury and  
7     say we have a license to that patent in Intertrust, but then  
8     they are not going to tell the jury whether they practice it  
9     or not or they are going to claim privilege as to whether  
10    they practice it or not.

11           Obviously, if you have a license, it is only  
12    relevant to the extent that you practiced it, and you  
13    believed it was valid and infringed. But we don't have any  
14    of that. I imagine what would happen is you find out they  
15    said it was invalid and you find out that they said they  
16    didn't practice it, and you find out that either they --  
17    after two years of litigation decided to say, yes, maybe we  
18    do infringe or they decided to pay up and get out just  
19    because it was easy.

20           So the problem is we don't have any of that  
21    information, Your Honor, and it is prejudicial in the same  
22    way that the patents, their other patents are. In fact, it  
23    is worse because they are going to get up and say this is  
24    prior art. So if we have a license to prior art, how can we  
25    possibly be infringing your patent? It goes back to that

1 same toxic argument about the patent, which a jury doesn't  
2 understand is that you can practice somebody else's patents  
3 but your patent doesn't make it where you can exclude -- if  
4 your patent only excludes, it doesn't allow you to have the  
5 right.

6 So with those two things, we think this one is  
7 worse than Apple's patents themselves given the privileged  
8 objection and issues like that.

9 THE COURT: Okay. Response?

10 MR. BATCHELDER: Your Honor, I think that the  
11 guidelines that we just talked about cover this one too.  
12 That is, for a given end licensed patent from a third party,  
13 we don't have to put the patent in front of a jury, but I do  
14 think that Apple should be able to say in the aggregate we  
15 end licensed a bunch of technology and even specified keeping  
16 entities from moving on the end licensed technology. Don't  
17 have to put patents in front of the jury. Of course --

18 THE COURT: Well, did you stonewall the plaintiff  
19 from getting discovery about those licenses?

20 MR. BATCHELDER: The answer to that is no. We  
21 produced licenses, and we put up a 30(b)(6) witness to talk  
22 about the licenses. To the extent that there was any  
23 question asked about infringement analysis, that was objected  
24 to as privilege for some licenses on a license-by-license  
25 basis. Those questions were asked. And, obviously, you

1 can't use privilege as a sword and a shield, so you can't go  
2 back on that at trial. But I think we are constrained by  
3 that general principle.

4 MR. CASSADY: Your Honor, we are back exactly where  
5 we were with regards to the Apple patents. They can tell a  
6 jury that they take licenses. They can tell a jury that they  
7 end license technology all the time.

8 What they are really trying to do here is say we  
9 took in technology from the prior art that we want to present  
10 to the jury, and it has no relevance that that was an issue  
11 other than to confuse the jury.

12 So, like I said, we are happy for them to say we  
13 take end licenses. We are happy for them to say we have  
14 licensed portfolios. But when they start saying we licensed  
15 this piece of prior art that we are putting in front of you  
16 right now, that specific issue has no relevance other than to  
17 confuse the jury.

18 And it is more important -- what is important about  
19 that is that even when we asked this question about these  
20 licenses, that is exactly the issue it goes to is the  
21 infringement, and they wouldn't answer the question. So I  
22 can't cross-examine that license, and then they moved to  
23 exclude how much the license was and all kinds of issues with  
24 the license because they said it is not comparable.

25 So you see what I am saying, there is no damages

1 issues. There is no analysis. It is simply just skunk in  
2 the box, get in there.

3 THE COURT: All right. My ruling is -- with regard  
4 to these is going to be consistent with regard to Apple's  
5 patents. I think you can generally say that you license  
6 other technology in the aggregate, but we are not going to  
7 get into the specifics of these particular licenses.

8 MR. CASSADY: Thank you, Your Honor.

9 THE COURT: What's next? I think it is defendant's  
10 turn.

11 MR. SCHENKER: Can we get the screen?

12 Your Honor, this is Plaintiffs' Exhibit 100. And  
13 as you see it is a licensing discussion between Samsung and  
14 Apple taken from another litigation, subject to, you know,  
15 previous MILs and agreements with respect to other  
16 litigations. That is one issue with it.

17 Additionally, there is definite content in here  
18 that we would consider prejudicial. There is talk of royalty  
19 rates paid -- negotiated between Samsung and Apple, which are  
20 not relied on as the royalty rates by Smartflash's experts  
21 and would be highly prejudicial in this case. This entire  
22 document should be left out.

23 THE COURT: Okay. Response?

24 MR. PEARSON: Thank you, Your Honor. We have no  
25 problem leaving most of this document out. We have no

1 problem working out deals on redactions. We were not able to  
2 do that before the hearing today. What we really need is the  
3 beginning of this document -- something from this first page  
4 sufficient to show that it is a document from Apple. Then we  
5 need what is on Pages 3 through 8.

6 If we could skip ahead. See -- if you could skip  
7 one page forward.

8 It talks about what makes a mobile computer or an  
9 iPhone an iPhone. Whenever you are ready, Your Honor, we can  
10 skip ahead again.

11 THE COURT: Okay.

12 MR. PEARSON: Next page, please.

13 The general history of Apple products.

14 If we could skip ahead again.

15 Here we have a slide about mobile computers relied  
16 upon several key technologies principally developed in the  
17 computing industry. We see things that are relevant to the  
18 accused products in this case such as apps, music, video,  
19 gaming.

20 This is an Apple presentation, and we think it is  
21 relevant to show the general importance that Apple believes  
22 some of the accused features in this case possess with  
23 respect to other features on their phone and considering, as  
24 we discussed, there is going to be some likely talk of, well,  
25 most of the value is on our phone, you know, the screen or

1 the battery life or some of the hardware-type features.

2 I think this document tends to undermine that and  
3 shows the importance of software in the Apple system.

4 Past this there are some slides about how much  
5 Apple was seeking from Samsung in its licensing discussion;  
6 and we have no problem removing those pages from this  
7 exhibit.

8 THE COURT: So you want to use this portion of the  
9 exhibit to show what? To show that Apple considered these  
10 features important features?

11 MR. PEARSON: Yes, as a general counter-argument to  
12 the trial theme we think Apple may present about most of the  
13 value of the accused devices being in the hardware.

14 THE COURT: All right. Mr. Schenker, let me get  
15 your responses as to these -- you know, not indicating that  
16 this is any kind of licensing agreement but as to these few  
17 pages that discuss some of the background of Apple's  
18 technology.

19 MR. SCHENKER: Well, again, Your Honor, I'm not  
20 sure how completely we can divorce these three pages even  
21 from the fact that this is a 408 discussion between Samsung  
22 and Apple in the context of other patent litigation and in  
23 the context of determining licenses between the parties and,  
24 you know, respective to two competitors and what two  
25 competitors would value with respect to each other's

1 portfolios and with respect to each other's patents and how  
2 to deal with that.

3 It is sort of hard to take individual statements  
4 from this entire presentation, which is, again, in its entire  
5 context, which I think they would agree generally shouldn't  
6 be as part of the case and say, well, we are just going to  
7 divorce those statements from everything else and try to get  
8 those in the record as relevant of what Apple believed in  
9 general.

10 THE COURT: I think certainly, generally, documents  
11 that reference to and are part of other litigation, we can  
12 agree are not going to be part of this case.

13 But, I mean, if I am just looking at Page 7, for  
14 example, I don't have any context this is part of a licensing  
15 analysis or that it is even between two competitors. To me  
16 it looks like an Apple document talking about some of its own  
17 technology. It seems to be fairly easily divorceable.

18 MR. SCHENKER: So I think we can agree that if we  
19 redact the cover page, the 408's on these -- any additional  
20 filing basically showing --

21 THE COURT: Yes.

22 MR. SCHENKER: -- where this is coming from, we can  
23 probably agree to the content on those three slides could be  
24 admissible.

25 THE COURT: Yeah, I mean, I feel like this is one

1 we can work out. Is there any need to keep these filing --

2 MR. PEARSON: No, no, absolutely not, Your Honor.  
3 I am obviously happy to redact that. I just didn't see that  
4 before.

5 THE COURT: So what pages are you talking about?  
6 Is that 4 through 7; 4, 5, 6, 7. Let me look at them.

7 MR. PEARSON: My notes say Pages 3 through 8.

8 THE COURT: Let's go back to 3.

9 MR. PEARSON: I might have should have said 2.

10 THE COURT: Okay.

11 MR. PEARSON: There is one more before that.

12 THE COURT: All right. So here you have a basic  
13 phone. I would say this is a Samsung phone. So tell me why  
14 we need this as far as discussion of Apple and its products?

15 MR. PEARSON: That's fine. We can start at Page 3.

16 THE COURT: The same thing, same question. It is  
17 also a Samsung. What has changed? What makes the Galaxy S  
18 relevant?

19 MR. PEARSON: I apologize, Your Honor, if we could  
20 start at Page 4.

21 THE COURT: We are narrowing it down. I like it.

22 All right. So Page 4. Looks to be about the  
23 iPhone, and I think we can remove all litigation/Samsung  
24 related, you know, parts of this page; and then it would be  
25 largely unobjectionable.

1 Is that right, Mr. Schenker?

2 Mine says 5 of 19. Is that Page 5 that we are on?

3 MR. PEARSON: Yes. I'm sorry. I was looking at  
4 the 4 in the bottom corner --

5 THE COURT: I see where you are.

6 MR. PEARSON: I'm sorry. Page 5 of 19.

7 THE COURT: Got it. 5 of 19, let's look at this.

8 Same thing, this appears to be all Apple for the  
9 most part.

10 MR. SCHENKER: That's fine.

11 THE COURT: What about the next page? Same thing  
12 here? What is next? That is it, right?

13 MR. PEARSON: I think this one is also okay.

14 THE COURT: It is okay. So there we go 5 through 8  
15 of 19 that is the pages I am looking at. Remove all  
16 reference to the filing numbers, that it is produced for  
17 business settlement. This note down here. Redact out any  
18 evidence that it is part of any kind of other litigation  
19 document.

20 MR. PEARSON: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. SCHENKER: Thank you, Your Honor.

23 THE COURT: As discussed, that will be admitted.  
24 What is next?

25 MR. PEARSON: Next, Your Honor, we have a few

1 buckets from Smartflash that are all essentially the same  
2 issue.

3 Mr. Schenker, for your record-keeping purposes,  
4 what we exchanged via email would be Smartflash's hearsay  
5 bucket 5 and 6; and what was about ownership, sub-bucket  
6 number 2.

7 These are generally the unaccepted offers to  
8 purchase documents that contain hearsay. I know there has  
9 been discussion earlier about high numbers and low numbers.

10 And just to reset the stage, we want all of these  
11 numbers out. We don't want this 2.25-billion-dollar number  
12 in. It doesn't go to anything but, you know, corporate  
13 structure was coming in and we reserved our right to have all  
14 of the facts in. But still, we think all of this should be  
15 out.

16 With respect to the unaccepted offers to purchase,  
17 we have emails that -- if I could draw -- and I am happy to  
18 pull up as many as you would like to see, Your Honor, it is  
19 about 10 documents. They are emails that are not cited in  
20 the damages report that are literally a random person  
21 emailing Patrick Racz saying things along the lines of:  
22 Thanks for the conversation. Here is how much I would like  
23 to buy your patent for just as we discussed.

24 And Patrick -- Mr. Racz emails back and says no,  
25 no, no, that is not what we discussed. So it would be, you

1 know, Mr. Albritton emailing me this evening and saying you  
2 did such a great job with the hearing, I'd like to buy your  
3 house; and I would like to buy it for five dollars.

4 And then I email him back and say, well, you know,  
5 I appreciate you thought I did a great job; but my house is  
6 worth more than five dollars. And that email is not going to  
7 be -- has nothing to do with whether my house is in actuality  
8 worth five dollars.

9 I thinks these are just -- there is no  
10 investigation into any of these offers. They didn't seek out  
11 these third parties. We don't have details about here are  
12 all of the things we looked at. Here is my process, and here  
13 is why I am right that your patent is invalid or your patent  
14 is worth \$100,000. It is just a bunch of things that got  
15 floated out in emails --

16 THE COURT: Okay. Let me see one.

17 MR. PEARSON: Sure. Can I please have DX 215?

18 Can we -- oh, man, I need glasses. Can we scroll  
19 down to the bottom. Further down, please, the next email  
20 down.

21 Okay. Can we scroll up just a little bit, a little  
22 bit higher. You see the email again.

23 THE COURT: It was good to catch up.

24 MR. PEARSON: Here we have Vicky begin: Dear  
25 Patrick.

1           Okay. If we could scroll down.

2           Good to talk to you. There is some mentions of a  
3 brief conversation. You know, we have to establish a basic  
4 agreement. We scroll down some more, and he sets forth in  
5 simple terms he is seeking such as an equity percentage.

6           Scroll down a little bit more.

7           0.9, the 150,000 pounds.

8           Then we are going to scroll all the way to the  
9 top.

10          Mr. Racz responds to someone now named Collin.  
11 Thanks for the call yesterday. And goes through some reasons  
12 why they don't, in fact, have an agreement.

13          If we could scroll down just a little bit more.

14          Here he says the 150,000-pound figure is a  
15 non-negotiable down payment. You know, I mean, just -- not  
16 valuing the IP in Smartflash at 150,000 pounds.

17          So there is a good sentence at the top that  
18 Mr. Cassidy can read that I can't because of my poor  
19 eyesight. I need a raise so I can afford glasses.

20          Please scroll up a little bit more.

21          He hasn't had an opportunity to discuss his  
22 proposal with his business partner.

23          So this is just -- they are all kind of complicated  
24 like this. We could go through more.

25          There is another email from a man named Mr. Juan

1 Gisone who offers to buy the '720 patent for 50 -- \$250,000.

2 They exchange a few emails about can you talk at 3:00

3 tomorrow?

4 They additionally have another email where Mr.

5 Gisone says: Well, thanks for the call. Looks like our

6 expectations don't overlap.

7 Well, you know, what does that go to show?

8 Nothing.

9 THE COURT: Okay. Response?

10 MR. BATCHELDER: Your Honor, we have already had  
11 exactly this argument. This was exactly their MIL H, and you  
12 have already denied it. I feel like we are reliving Ground  
13 Hog Day. We just don't have time for this.

14 These are unaccepted offers, as we talked about at  
15 some length last time around. They book-end the hypothetical  
16 negotiation. And there were many of them where the market is  
17 speaking to the market's valuation of these patents. And  
18 they are pretty consistent. They range basically from about  
19 50K at the low end to about 350K at the high end.

20 They can criticize them, they can cross on them.  
21 Their arguments go to weight; not admissibility. That is why  
22 Your Honor denied the MIL the first time around.

23 MR. PEARSON: Your Honor, I apologize I wasn't able  
24 to attend the hearing last time. My team is whispering to me  
25 that last time you didn't necessarily say unaccepted offers

1 of purchase were definitely coming in, but that you would  
2 take it up on an exhibit-by-exhibit basis. I'm not sure if  
3 that's true. I haven't had a chance to review that part of  
4 the transcript.

5 But I don't think that these emails show the market  
6 value of these patents. Just because Mr. Albritton has the  
7 capacity to email me and offer me \$5 for my house, that  
8 doesn't have anything to do with the market value. They have  
9 done nothing to subpoena these people or prove they were  
10 experts or prove they had some sort of special insight into  
11 the market's appreciation for these documents.

12 Not to mention -- I am just going to read into the  
13 record, if you would permit me, DX 204, 215, 225, 322, 323,  
14 324, at least, are not even in the damages expert report.

15 THE COURT: Okay. Let me get a response about  
16 that.

17 Mr. Batchelder, I mean, how are these relied on by  
18 your damages expert report, if at all?

19 MR. BATCHELDER: The one that we -- the one that we  
20 just went through is relied. I don't have these other  
21 document numbers memorized, so I would have to see them to  
22 see --

23 THE COURT: So what does he do, he looks at it and  
24 he incorporates that in his valuation of the patents.

25 MR. BATCHELDER: Yeah. Well, what he does is he

1 comes up with a calculation, and then he cites a lot of  
2 offers to basically show they are corroborative; that the  
3 market is -- in fact, a lot of these were responsive to  
4 actually reaching out to people and soliciting offers. He is  
5 negotiating. He sends out a ton of emails to various players  
6 in the market saying I am interested in investing in a patent  
7 portfolio. And he gets responses back.

8           So the market collaboratively is speaking on what  
9 the market thinks about -- or at least making these offers.  
10 All of the arguments that were just made as to how they could  
11 be distinguished or belittled or whatever, again, goes to  
12 weight and not admissibility. That is what you already ruled  
13 on.

14           MR. PEARSON: And I appreciate that he brought that  
15 up. I failed to mention that. There are a lot of emails, as  
16 he mentioned, where Mr. Racz is just floating things out  
17 there in the market, and we didn't object to those, and those  
18 are all on their exhibit list and will be coming in.

19           These are a specific category of hearsay statements  
20 from third parties that are not proved up. I don't want to  
21 be making ticky-tacky hearsay arguments, but I think it is  
22 important in this case because these statements really are  
23 clearly prejudicial.

24           Now, to the extent that Mr. Racz is saying  
25 something, sure, we have to live with it. I understand.

1 THE COURT: Okay. How do you get over the hearsay  
2 objection?

3 MR. BATCHELDER: I'm sorry?

4 THE COURT: How do you get over the hearsay, the  
5 objection that these objections are full of hearsay?

6 MR. BATCHELDER: Your Honor, these are documents  
7 from a given entity saying what would you think about selling  
8 me your patents for X dollars. I don't think that is  
9 hearsay.

10 THE COURT: Right. That part is not. But what  
11 about the responses?

12 MR. BATCHELDER: Responses from --

13 THE COURT: From third parties.

14 MR. BATCHELDER: What I am saying is these are  
15 documents from third parties. They are saying we would like  
16 to pay X dollars for your patent rights.

17 So -- Your Honor, can I suggest this? You have  
18 ruled on this in a MIL. I think the one we just saw up on  
19 the board is covered by the MIL explicitly because, again,  
20 this is an entity saying we are willing to pay you this many  
21 dollars for your patent rights.

22 If they have other documents -- and he just threw  
23 our some document numbers and didn't put them up on the  
24 board; but given the guidance that, generally, Your Honor's  
25 ruling on MIL H stands that if we have some other specific

1 documents you want to talk about, we can have this more  
2 granular conversation to try and reach agreement.

3 THE COURT: The MIL is one thing, but now we are  
4 pointing to a specific objection and -- I mean, exhibit and  
5 saying within this exhibit there is hearsay, out-of-court  
6 statement offered by a non-party to prove the truth of the  
7 matter asserted. And these responses to Racz, those are  
8 hearsay and tell me the exception to hearsay that gets them  
9 into an admissible form.

10 MR. BATCHELDER: Your Honor, if Mr. Racz reaches  
11 out to me and says I am interested -- even he doesn't try --  
12 he reaches out and says I'm interested in investments, and I  
13 respond by saying I am willing to pay you X dollars, I don't  
14 see that is hearsay; and if it were, it would be arguably, at  
15 least, an offer of contract, which is a legal document. It  
16 is legally operative conduct.

17 In any event, this is a document that, as I just  
18 said, that Dr. Becker does rely on. As an expert who is  
19 saying this is corroborative with my damages calculation, he  
20 can point to that in an expert report.

21 And, by the way, that point also came up in the MIL  
22 argument.

23 MR. PEARSON: I'm certainly not trying to cast  
24 doubt on what he saying, but I really did check last night  
25 and the Vicky/Collin email that we just read is not cited in

1 Dr. Becker's report; at least not by Bates label. I couldn't  
2 find it.

3 I think there is a fundamental difference in  
4 Mr. Racz saying would you like to buy my patents for \$500,000  
5 and somebody responding versus just somebody floating in an  
6 email to him with respect to what we just saw like the Vicky/  
7 Collin email.

8 I'm not just trying to read a bunch of emails in  
9 the record that they didn't know about. We have been  
10 emailing about this for days. I am happy to go through each  
11 of the documents one by one if the Court feels that is  
12 necessary. You know, we can look at PX -- or DX 204, the  
13 Mr. Gisone email that I described as fundamentally the same  
14 that is not in Dr. Becker's report.

15 I really -- I want to assure the Court I really did  
16 try to limit my objections in this bucket to really just the  
17 precise thing that I have described, not where Patrick is  
18 affirmatively trying -- Mr. Racz is affirmatively trying to  
19 sell something.

20 MR. BATCHELDER: If I could, Your Honor?

21 THE COURT: Sure.

22 MR. BATCHELDER: I do think that, again, if an  
23 industry player is saying I am willing to pay X dollars for  
24 your patent, they can criticize it, they can cross it; but  
25 that is relevant evidence that an expert can rely upon in

1 valuation or as confirmatory. And that document should come  
2 in, and all of their criticisms can go away.

3 THE COURT: All right. Here is my ruling: The  
4 documents that are explicitly referred to and relied on by  
5 the expert in his report can come in. If they are not, they  
6 are out.

7 What is next?

8 MR. PEARSON: Thank you, Your Honor.

9 MR. CASSADY: Your Honor, I assume when you say  
10 reliance, we are not saying part of the documents considered.  
11 We are talking about it is actually in the report in some  
12 way, shape, or form. It is not the billions of documents  
13 considered. It is in the report somehow.

14 THE COURT: I mean, what I have heard from  
15 Mr. Batchelder is that he looked at this and used it as  
16 corroborative of the valuation in his report. To the extent  
17 he did that, then, yes, it is coming in.

18 MR. CASSADY: Right. Right.

19 THE COURT: I see what you are saying, if it is in  
20 the blanket of tens of thousands of documents he considered?

21 MR. CASSADY: Yeah, many experts just point to the  
22 production and say I considered it. It is not that. It is  
23 the latter or former -- it is the one where they actually did  
24 it.

25 THE COURT: That's right.

1           Now, that bucket, that was one document; but were  
2           there others in that particular bucket?

3           MR. CASSADY: Exhibit numbers for that bucket?

4           THE COURT: I mean, not with regard to this notion  
5           of unaccepted offers. Is there another category of documents  
6           that is in that same bucket before we move on to the next  
7           one? More hearsay?

8           MR. BATCHELDER: While he is looking for that, Your  
9           Honor --

10          THE COURT: Sure.

11          MR. BATCHELDER: -- I just want to be clear, if I  
12          think that Mr. Racz has said something that opens the door to  
13          cross with these documents, I take it you are not ruling that  
14          out for now.

15          THE COURT: I am not. I am trying to think if I  
16          need to just get you to approach before you get into that. I  
17          would think so. In light of this ruling, before you just  
18          walk through that door that you think has been opened, take  
19          it up with Judge Gilstrap and make sure. All right?

20          MR. PEARSON: Then just to correct the record, I  
21          have some highlighting on my paper, and I reversed it. The  
22          Vicky/Collin email is, in fact, cited in Dr. Becker's report.  
23          So my apologies.

24          THE COURT: Is cited. Okay.

25          All right. We have been going about an hour and

1 some change, so we are going to take a break, and then we  
2 will take up the remainder of the buckets and, hopefully,  
3 resolve those and move on to some other pending issues.

4 We will be in recess for 15 minutes.

5 (Recess was taken at this time.)

6 THE COURT: Please be seated.

7 All right. What is next?

8 MR. SCHENKER: So, Your Honor, I think for the next  
9 bucket we will sort of be in the vein of hearsay. These are  
10 letters or emails from Steven Landau starting with Exhibit  
11 113, 141.001 --

12 (Reporter requests the number to be repeated.)

13 MR. SCHENKER: Certainly. 113, 141.001, 162, 194,  
14 and 200.

15 We would ask that all of these be excluded as  
16 hearsay.

17 THE COURT: And tell me who this is.

18 MR. SCHENKER: This is Steven Landau who at one  
19 point who was a VP at Gemplus and at another point was the  
20 president, I believe, at Internet Plc.

21 Now, with respect to this one, it is still sort  
22 of -- I mean, it gets even more confusing in terms of, you  
23 know, of which shoe he is speaking of here because Patrick --  
24 and my eyes are just as bad -- would you be so kind as to  
25 forward -- summarize this email. I was getting Gemplus.com

1 email server problems as usual.

2           So beyond whether he is trying to send this as a  
3 Gemplus representative and, therefore, it is not an Internet  
4 Plc statement, you know, that raises the question.

5           And then beyond that, the entire agreement talks  
6 about -- summarizes his meetings with other people and  
7 summarizes what those people have said to him, which includes  
8 quotes from those meetings; and, you know, we would say that  
9 at the very least it includes hearsay within hearsay with  
10 respect to all of that.

11           THE COURT: Okay. Response?

12           MR. SUMMERS: Thank you, Your Honor. John Summers  
13 for Smartflash.

14           This will be pretty easy, I think. We are not  
15 looking to use these emails for the truth of the matter  
16 asserted. We are not trying to prove up that these  
17 agreements happened or that, you know, Steven Landau said  
18 this and someone told Steven Landau that.

19           These exhibits are really just on the exhibit list  
20 to corroborate Mr. Racz's story of, you know, Internet Plc  
21 and Gemplus days and the potential agreement there and that  
22 whole story that goes into Gemplus's ultimate passing off of  
23 Mr. Racz's idea.

24           So the Steven Landau emails are not for the truth  
25 in the emails. They are just Mr. Racz's impression, the

1 favorable feedback he was getting from Gemplus and then the  
2 favorable, you know, statements from Mr. Landau after he  
3 became president of Internet Plc.

4 THE COURT: What do the emails say? I mean, this  
5 is three pages single-spaced full of all kinds of stuff.  
6 What does it say generally?

7 MR. SUMMERS: Just generally it is about a -- this  
8 particular email is about a meeting that Mr. Landau had with  
9 a particular business person talking about various investment  
10 potential and people, you know, thinking that the Internet  
11 Plc idea is a good one and just that this business that  
12 Mr. Racz was involved in, he was hearing from other parties  
13 that he was in a legitimate enterprise that was going to do  
14 well, which ultimately did not.

15 THE COURT: Tell me why do you need them in  
16 addition to his testimony to that effect.

17 MR. SUMMERS: Well, Your Honor, it would just be  
18 corroboration to the extent that any part of his relationship  
19 with Gemplus and the business discussions related to that are  
20 at any point not -- or impeached or anything like that.

21 MR. CALDWELL: I can give you, perhaps, a more  
22 concrete example, if you would like.

23 Throughout the case the defendants have attacked  
24 Mr. Racz saying that his business failed and -- I mean, you  
25 have heard about the arguments related to that. That somehow

1 relates to value.

2           The truth of the matter is that he was very  
3 successful before the Smartflash invention and had a lot of  
4 money that he had made off of other ideas and businesses that  
5 he had put together, and he basically spent every penny of  
6 that trying to build something and working with Gemplus.

7           And these documents are part of actually his story  
8 of what ended up happening. He basically put in every bit  
9 that he had, was completely, essentially, wed to a partner  
10 who eventually, due to a variety of different circumstances  
11 including change of management -- and in a sort of weird,  
12 convoluted way just something fell apart September 11th with  
13 the business deal that they had; and believe it not because  
14 Britney Spears wouldn't fly on a plane to do a European tour.

15           What ended up happening is that business  
16 relationship crumbled, and at that point he had -- is why he  
17 was eagerly throwing every penny he had into this deal  
18 because he thought he had a business partner who was running  
19 lockstep with him. And that is what he was representing and  
20 the impression he had.

21           And at the end when they pulled out, he is  
22 essentially left with nothing.

23           And this sort of theme of failure has been a theme  
24 of the defendants from the beginning. It is what he was  
25 hearing, what he was feeling, why he was putting his money in

1 it, why he had cause for optimism. And all that just really  
2 goes to the story of his business.

3 THE COURT: Well, the initial argument that I heard  
4 is that these emails are not hearsay because they are not  
5 offered for the truth of the matter.

6 Aren't they offered for exactly the truth of the  
7 matter to show that the idea had some pull to it?

8 MR. CALDWELL: I don't think so. Certainly that is  
9 some anecdotal aspect of it. I'm not going to deny that it  
10 is. I think the point is, though, what matters is what was  
11 Mr. Racz's hearing and why was he sticking with this business  
12 partner, who is, honestly -- it was kind of a rocky road a  
13 couple of times.

14 In fact, he goes to a trade show and sees that the  
15 things they had worked on together, they are just pitching as  
16 their own.

17 One time he is in a meeting he finds that they had  
18 taken one of his PowerPoints and scrubbed out all mentions of  
19 his company and then their own company. Why do you keep  
20 working with them?

21 And what has happened is that it is all part of his  
22 story as to why once he got locked in and spent all his  
23 money, why he did a full investment with his business partner  
24 and let everything hang out there, because everything seemed  
25 on the up and up at the beginning and they were supportive.

1 But he basically spent everything he had.

2 So it is not so much we have the burden of proving  
3 that Gemplus liked him. Right? That is not the point. The  
4 point is why did you make these people your business partner  
5 and go hand in hand with them through this rocky time period.

6 THE COURT: Okay. Response?

7 MR. SCHENKER: I mean, I think Your Honor hit the  
8 nail directly on the head that if this is being used to  
9 corroborate Mr. Racz's testimony, that this is being used for  
10 the truth of the matter asserted.

11 Mr. Caldwell hasn't denied that. He said you  
12 know -- it is true, but he explained that because there is  
13 a -- you know, Mr. Racz has this sympathetic story, so the  
14 truth of the matter should be allowed in these hearsay  
15 documents, and it just doesn't get around the fact that these  
16 documents are hearsay.

17 If they want to show -- or talk about third-party  
18 conduct and what happened, they can bring evidence that it is  
19 third-party conduct, that doesn't allow these hearsay  
20 statements into the record, and it doesn't allow this to get  
21 in.

22 The question is: Mr. Racz, why did you keep  
23 working with these people? I don't see why you need hearsay  
24 talking about all of the problems in order to say why did you  
25 keep working with these people. That is his testimony. The

1     corroboration is hearsay, and it is being offered for the  
2     truth of the matter.

3             MR. CASSADY: Your Honor, just a real crystal  
4     description of this. We don't care that he said -- that  
5     Landau said that he was happy about the project and happy to  
6     work with Patrick. We don't care about the truth about  
7     whether the project was actually really good to Gemplus or  
8     not. Nobody cares about that. We don't care about that.

9             What we care about is he made that statement. He  
10    made the statement so that Patrick was relying on a  
11    statement.

12            Whether it is true or not, doesn't matter. We are  
13    not trying to tell a jury that Mr. Landau said that our  
14    project was great and awesome. That is not the purpose of  
15    this document for us. The purpose is for Mr. Racz to say is  
16    he was told that Landau's company thought it was great and  
17    awesome. And that is the difference.

18            THE COURT: And he acted on that?

19            MR. CASSADY: And he acted on it, and that is the  
20    difference.

21            THE COURT: Okay. All right. I am going to  
22    overrule the objection and admit those documents.

23            What is next?

24            MR. CASSADY: Okay. Your Honor, the next one is a  
25    couple of sub-groups; but I think these will go relatively

1 quickly. Other litigation motion in limine.

2 My understanding is, basically, the Court and the  
3 parties in the last hearing -- I don't remember whether it  
4 was your order or whether it was agreement, but we are not  
5 going to talk about other litigation in the case. So this --  
6 these sub-groups here are mainly about that.

7 So the first one, real quick, is DX 306. And I  
8 actually have glasses, so I will go ahead and put them on.

9 So -- although I don't know that will help.

10 THE COURT: We just need to get a monitor at the  
11 lectern.

12 MR. CASSADY: Right.

13 THE COURT: That is just a little, minor technology  
14 upgrade.

15 MR. CASSADY: So, Your Honor, these are two --  
16 these are two or three Apple employees talking about this  
17 very lawsuit, and they are kind of joking with each other  
18 about the fact that Mr. Farrugia was named in the actual  
19 complaint.

20 So here they are saying: According to the lawsuit  
21 you're just using patented technology divulged to you before  
22 you joined Apple. Of course, there are lawsuits that  
23 implicate all of us doing that the same. The difference is  
24 we don't all get named in the press.

25 I mean, I don't what this goes to. I have no idea

1 what it goes to. But, clearly, it is insinuating Apple gets  
2 sued all time. You should have sympathy for Apple because  
3 they get patent lawsuits, and everybody in there gets sued.

4 So, clearly, to me it insinuates that, and I think  
5 it should be gone.

6 THE COURT: All right. Response?

7 MR. BATCHELDER: Your Honor, I would say that for  
8 the -- can we put it back up again?

9 THE COURT: Yeah, can you put it back up there for  
10 me, please. Thank you.

11 MR. BATCHELDER: I believe that Mr. Faruggia  
12 received his notice of the lawsuit from this email exchange.  
13 We are happy to redact that document in the reference to  
14 other lawsuits, et cetera.

15 But I do think that he needs to be able to say that  
16 he learned of the lawsuit from his colleague if he is  
17 questioned and accused of willful blindness and not caring,  
18 et cetera. Somehow we need him to be able to testify about  
19 that fact.

20 But, frankly, I don't think this statement about  
21 other lawsuits and Apple being accused in another setting, I  
22 don't think that belongs in this case.

23 THE COURT: All right. Agreed? Well --

24 MR. BATCHELDER: If you would like, Mr. Melaugh has  
25 suggested we don't need the document for him to do this. If

1 he can just testify to that, we are okay with that  
2 solution.

3 THE COURT: What do you think about Mr. Faruggia  
4 testifying that he found out via an email from a colleague  
5 that he was in this lawsuit?

6 MR. CASSADY: Yeah, this is their exhibit, so if  
7 they are going to pull it and that is the testimony is what  
8 they are going to say, that is fine.

9 MR. BATCHELDER: That is fine. If Mr. Faruggia can  
10 respond to this. So if those emails are out, and he can just  
11 testify how he learned about the lawsuit, that is fine.

12 MR. CASSADY: That is fine, Your Honor.

13 THE COURT: Good. Easiest decision I made.

14 MR. CASSADY: See I was right. Like Mr. Albritton  
15 did, see how quick that was.

16 So the next one I hope is just as quick. There are  
17 a number of exhibits from Apple regarding their awards they  
18 have received on the patented features or features around the  
19 patented features, and they want to bring those in.

20 I think we are okay, but we have a little issue, a  
21 little, tiny distinction between the parties. Your Honor may  
22 remember they wanted to be able to say some form of:  
23 Smartflash, you know, basically contends that these other  
24 people, Samsung and HTC, infringe the patents.

25 Okay. So, Your Honor, asked us to meet and confer

1 about that issue. We did. We did narrow it down to exactly  
2 that. Apple now wants to say that here are these awards we  
3 won, and these awards we won were over the people you say  
4 contend -- or you contend also infringe these patents.

5 What we are saying is that is going to insinuate  
6 the other litigation. We are happy to say that you can say  
7 these other people have the feature. You can say Samsung has  
8 this feature, HTC has this feature, and we won these awards  
9 over them. And you won't hear a peep from me or maybe on my  
10 side that we contest that issue that that feature is there  
11 and that it exists in other products.

12 We just think using the word "contend" is  
13 insinuating we have another lawsuit out there. That is a  
14 skunk-in-the-box issue for the jury. And I don't see what  
15 they are gaining by using the word "contend" versus they have  
16 the feature and we don't contest it.

17 THE COURT: Okay.

18 MR. BATCHELDER: We did talk about this last time,  
19 and I think Your Honor carried it so that we could see how  
20 this actually came up in the expert depositions. And here is  
21 what I want to be able to do, and I will be happy to read you  
22 an excerpt from the Mills' transcript from just last Friday  
23 about it.

24 But what I want to be able to do is not bring up  
25 other lawsuits but to say, generally, you say that Apple

1 practices your patents. You say that another entity,  
2 Samsung, for example, practices your patents. And here is an  
3 industry award that an Apple device that is accused won over  
4 a device from Samsung that you say practices your patents.  
5 And, Mr. Expert, isn't that relevant? Doesn't that reflect  
6 the success of the Apple product, that award? Doesn't that  
7 reflect that it is succeeding in the marketplace because of  
8 the value that Apple is bringing to the table on the patents?  
9 Because they have, according to Smartflash, those patents in  
10 common.

11 So I asked Mr. Mills about this. I'll just read,  
12 you, with your permission, a couple Q and A's.

13 THE COURT: Sure.

14 MR. BATCHELDER: QUESTION: If product A from  
15 company 1 and product B from company 2 were both accused of  
16 practicing the same patents, and product A has been highly  
17 successful and product B has been less successful, could that  
18 indicate that the success of product A is attributable to the  
19 value that company 1 has brought to that product?

20 ANSWER: That is theoretically possible, yes.

21 And then I asked him more in the concrete.

22 QUESTION: In your opinion as you sit here, is it  
23 relevant to extent to which Apple's accused products have  
24 done better or worse in the industry than the accused  
25 products of other entities accused of infringement by

1 Smartflash?

2 ANSWER: Yes, I think it is relevant.

3 So it is relevant to damages. Their own expert  
4 admits that it is. I would just like to be able to cross him  
5 on that.

6 Again, I wouldn't bring up other lawsuits. I would  
7 just say these are products that Smartflash says practice the  
8 patents-in-suit. And I don't think that tells the jury  
9 anything else about other litigation.

10 MR. CASSADY: Your Honor, we are playing word  
11 games, but they are important word games. Saying it is an  
12 accused product or saying we accused it or we contend it  
13 infringes, insinuates the litigation. It just does.

14 So I don't understand why he can't cross Mr. Mills,  
15 my expert, on the issue of the product with the feature at  
16 one company versus the product with the feature at another  
17 company. That is the way he should have been asking the  
18 question. He knew this was an issue when he took the  
19 deposition.

20 This was a deposition 48 hours ago. This isn't the  
21 deposition months ago we didn't know this was an issue.

22 But I am happy to work with them and Mr. Mills to  
23 say, look, when you get asked this question, this was your  
24 answer from the testimony, and he is going to ask about this  
25 product has a feature and Samsung's products have the

1 feature. And we are not going to talk about contentions, and  
2 we are not going to talk about accused products.

3 And so if they want to -- we want to work that out,  
4 that is the way to deal with that because at the end of the  
5 day to a certain degree we are creating an artificial world  
6 to keep the jury from understanding that fact. And this  
7 pierces that veil and makes it where they are going to  
8 starting asking themselves about that, and they are going to  
9 say what about -- the lawsuit.

10 I think even us saying that they have the feature  
11 is going to beg the question. But at that point the question  
12 won't be lawsuits, which is what accused products or accused  
13 feature, that's what it sounds like.

14 MR. BATCHELDER: So I hope it is clear. But the  
15 reason I asked this question in the deposition is precisely  
16 because we talked about this last time, and I wanted to  
17 establish the relevance, and their expert has now conceded  
18 the relevance, and I think it just makes common sense.

19 But to say that Samsung has the feature, doesn't  
20 get to the point. The point is that Smartflash is saying  
21 that these two different products have the patents in common,  
22 and we want to be able to say that if that is true and this  
23 one has been more successful, it is because of the value that  
24 Apple has brought to that product.

25 THE COURT: Why can't you say it just like that?

1 If the Apple products and the Samsung products have these  
2 patents in common; and if Apple has been more successful,  
3 then wouldn't you say that is because of the things that  
4 Apple brings to the --

5 MR. BATCHELDER: That is exactly what I want to do,  
6 Your Honor. So when you said they had the patents in common,  
7 I just want to be able to say that Smartflash says practice  
8 these patents. That is all I want to be able to do. I don't  
9 want to say litigation. I don't want to say suit. I just  
10 want to say Smartflash says these two products, company A,  
11 company B, Apple, Samsung practice these patents.

12 And so according to them they have that in common.  
13 So the success of this one must be attributable to the value  
14 that Apple brings to the table.

15 MR. CASSADY: Again, why aren't we just saying they  
16 have the same patented feature? The word "patent" is not  
17 what bothers me. I mean, they can say -- but it is the  
18 insinuation that comes along with it that they want to do it  
19 where it is Smartflash contends that they have this.

20 Well, there is no purpose in that. Just say, for  
21 the purpose of this litigation we are going to say they have  
22 the patented feature.

23 THE COURT: Right. That is the thing is I don't  
24 know why we need to say Smartflash says they have them. Why  
25 can't everyone in the room just at that point in that line of

1 questioning agree that these phones have the patents in  
2 common? I mean, Smartflash isn't going to object to that  
3 because the response would be, well, then I need to get into  
4 why we are saying that, right? Which we don't want to do.  
5 So can't we do it in a way that is a little bit higher level?

6 MR. BATCHELDER: Well, my only concern about that  
7 is there will be no evidence in this trial about Samsung  
8 practicing the patents. So I am afraid that would be  
9 confusing. I think we need to be able to say that Smartflash  
10 has said that.

11 THE COURT: I understand that concern. I mean, how  
12 can we alleviate that?

13 MR. CASSADY: Well -- what is the evidence that is  
14 going to be put in now? Just him saying we contend  
15 something? We are not contesting it. We are basically all  
16 agreeing to it, so that seems a lot more powerful evidence  
17 than just we contend it. That is what I am saying. I just  
18 don't see how this doesn't blow up in all litigation  
19 issues.

20 MR. BATCHELDER: I just want to be able to have my  
21 expert say and be able to cross their expert on the notion  
22 that Smartflash has said that these two products both  
23 practice the patents-in-suit.

24 THE COURT: Well, I think you can just start with  
25 these two products both practice the patents-in-suit, and no

1 one is going to object to that from this side; and so it is  
2 going to be a generally-accepted idea as a baseline to start  
3 with.

4 Yes? I mean, what am I missing?

5 MR. BATCHELDER: Your Honor, that would be an  
6 admission of infringement, if I may, if I put it that way. I  
7 can't say that. It really has to be based on their  
8 contention.

9 MR. CASSADY: Well, no, your part has to be based  
10 on our contention because you don't want to agree that you  
11 infringe our patents. You are not admitting anything for  
12 Samsung, I mean, so you can say --

13 THE COURT: Poorly worded question by the Judge. I  
14 would never want you to say we practice the patent --

15 MR. CASSADY: Your Honor, if he wants to say yes,  
16 that's fine. But I am saying, you know, the point is it is  
17 with regards to them that it actually matters --

18 THE COURT: All right. Listen, you guys keep  
19 working on it. You are close. I think the line of  
20 questioning is fair. And I think there is a way to do it  
21 without implicating other litigation.

22 MR. CASSADY: I agree with the line of questioning,  
23 Your Honor. I totally agree. That is not the argument.  
24 Yeah, we will keep working on it.

25 MR. BATCHELDER: Thank you.

1 THE COURT: All right. What is next? How many  
2 more buckets do we have? Let's have a bucket update.

3 MR. PEARSON: Two more relating to trial exhibits  
4 from Smartflash, Your Honor.

5 MR. SCHENKER: Your Honor, two more coming from  
6 Apple.

7 MR. CALDWELL: And 75 deposition buckets.

8 THE COURT: What? What?

9 MR. CASSADY: It's a joke. Just ignore it.

10 MR. BATCHELDER: Your Honor, if I could -- I'm  
11 sorry to interrupt. For timing purposes and planning  
12 purposes in the afternoon, I know Your Honor wanted some  
13 brief commentary on standing. We are happy to do that.

14 I also want to make sure that I am carving out 15  
15 minutes to address, Your Honor, the emergency motion we filed  
16 Friday about the late-disclosed Mills' calculation that we  
17 got on Thursday night.

18 THE COURT: Okay.

19 MR. BATCHELDER: It is just really important to us,  
20 and we want to get that resolved.

21 THE COURT: Okay. Then we will save some time for  
22 that.

23 MR. BATCHELDER: Thank you. I appreciate that.

24 THE COURT: And, really -- I mean, I have the  
25 briefing on the standing issue. I have been through all of

1 it, so it is really just to give you an opportunity to reply  
2 to the response.

3 MR. BATCHELDER: Thank you.

4 THE COURT: And just because we haven't had an  
5 opportunity, so...

6 MR. SCHENKER: Okay. So the second to last on our  
7 bucket list, we have got Exhibits 102.001 and 102.002 are  
8 videos -- they are described as videos of Tim Cook Intro at  
9 WWDC. That is the Worldwide Developer Conference.

10 These are two videos of Tim Cook, the CEO of Apple,  
11 and other people putting a presentation at a convention. One  
12 of them is over an hour-and-a-half long.

13 I guess we are objecting to these on the grounds of  
14 relevance. We are objecting to them also -- on the first one  
15 of two videos, for example, talks about worldwide numbers in  
16 terms of number of apps downloaded worldwide and amounts of  
17 money paid to developers worldwide, which we think, given  
18 some of the issues that have already been hashed out today,  
19 would be prejudicial and wouldn't be there.

20 The larger issue is we don't really see how these  
21 videos can be relevant at all, especially not one that is an  
22 hour-and-a-half long and how it is planned to be used.

23 It wasn't relied on by their infringement experts  
24 in terms of identifying how the accused features worked. I  
25 don't believe it was relied on by their damages experts in

1 terms of apportioning damages.

2 So the fact that Apple participates in a Worldwide  
3 Developer Conference that has videos on it, just seems really  
4 highly prejudicial to put out there, and without any  
5 probative value.

6 THE COURT: Okay. Let's talk about the videos.

7 MR. STEWART: Your Honor, Chris Stewart for  
8 Smartflash. I don't think we need to play the videos,  
9 especially not the hour-and-a-half one.

10 THE COURT: Not the hour-and-a-half one.

11 MR. STEWART: However, my colleague, Mr. Cassidy,  
12 just pointed out to me that in a previous case that he had, I  
13 think Opti versus Apple, these same videos were attempted to  
14 be entered only in part, a piece of them; and there was  
15 actually objection from Apple about incompleteness, and I  
16 think they entered the entire video.

17 That is the reason for the entire video being in  
18 because to the extent there are relevant portions which --  
19 which we think Apple should agree the entire video should  
20 come in.

21 As to the relevance, of course, these are, you  
22 know, speeches by Apple's CEO and CF -- and other high  
23 executives about the accused features.

24 THE COURT: So what parts do you want to play and  
25 why?

1 MR. STEWART: So there are going to be a smattering  
2 of clips throughout the videos that go to the accused  
3 features, the App Store, the various features on the devices  
4 related to the App Store and the other infringing technology,  
5 videos and music.

6 So it is going to be kind of smattered throughout.  
7 These are conferences and features given to app developers,  
8 so there is going to be the discussion throughout about the  
9 importance of the app development -- app developer community  
10 to Apple and to Apple's products.

11 So to the extent, you know, we needed to sort of do  
12 a splicing, it wouldn't, in our opinion, be very efficient.

13 THE COURT: Okay. So you are not going to be  
14 relying on any worldwide app developing numbers or anything  
15 else that was just listed as objectionable.

16 MR. STEWART: Certainly, you know, we already  
17 discussed earlier, Your Honor, that to the extent these are  
18 preadmitted they obviously still would be -- you know, would  
19 be subject to the motions in limine.

20 THE COURT: Would it give Apple some comfort if I  
21 ordered them to narrow down to what they think they will  
22 be -- the snippets they will be using, and then let you see  
23 those under the grounds you won't make an incompleteness  
24 objection because, obviously, I have ordered them to narrow  
25 it down. So maybe we could resolve this dispute, in other

1 words, by getting them to whittle it down to what they really  
2 need in that presentation.

3 MR. BATCHELDER: That is exactly what we propose,  
4 Your Honor. Thank you.

5 THE COURT: Okay. Let's do that.

6 MR. CASSADY: Your Honor, I will just say one thing  
7 just to put this out there, so we don't have to come back  
8 here.

9 THE COURT: Sure.

10 MR. CASSADY: There are a couple of snippets in  
11 that video that I am aware of where Tim Cook is making  
12 statements about the overall units of downloads that have  
13 occurred. Like, we have allowed a billion app downloads. He  
14 is telling the app developers that. And he is telling the  
15 app developers how important they are to Apple.

16 Those kind of generic statements, I'm assuming  
17 nobody is objecting to those. I mean, there is no reason not  
18 to bring it up now in case there is going to be an issue. I  
19 don't see what issue there would be with that, but you tell  
20 me.

21 MR. ALBRITTON: Well, I mean, those are worldwide  
22 downloads, Your Honor. Those are not -- I mean, we have no  
23 objection to it if it is U.S.-only downloads but not  
24 worldwide downloads. We would object to that.

25 MR. CASSADY: Well, they don't talk in United-

1 States-only downloads. And this is our only way to show Tim  
2 Cook telling them how important the stuff is. I mean, this  
3 is what it is.

4 And so he is saying worldwide downloads of apps as  
5 a billion, I'm not sure that -- I mean, we are not using it  
6 as a royalty calculation. We are not talking about dollars.  
7 We are talking about units. You know, so I am not sure what  
8 the issue is.

9 That is why I brought it up because I thought this  
10 might be what it is.

11 THE COURT: What is this used in response to --  
12 this notion -- I'm trying to see if it is in response to what  
13 you think is an overarching theme is that, you know, there is  
14 not a lot of that going on. I mean, is there anyone  
15 disputing that there are a lot of app downloads?

16 MR. CASSADY: No. And -- actually -- my point is  
17 to show the jury how important it is. I think sometimes  
18 juries lose sight of the witness testimony that is in front  
19 of them, but why don't you hear from the CEO. No, we didn't  
20 ask them to bring the CEO to a deposition so we can get his  
21 testimony about it. But that doesn't matter because this is  
22 an admission against a party opponent.

23 So we think it is important to play those videos to  
24 the jury in the position of the market and what they are  
25 looking at with this player instead of just the now

1 litigation based statements of the witnesses. So I have done  
2 this in a couple of Apple cases, and we have played videos  
3 like this --

4 THE COURT: Okay.

5 MR. POST: The issue is that they are, in fact,  
6 worldwide numbers. They are not limited to U.S. conduct. We  
7 have produced to Smartflash large spreadsheets, all kinds of  
8 ways. They know exactly how many downloads have taken place  
9 in the United States and United States customers. So those  
10 numbers are there. They just are not in a video form.

11 The problem is the video form is worldwide numbers.  
12 That is the issue. That is prejudicial.

13 MR. CASSADY: Your Honor, what is going to  
14 happen -- so, yes, I have U.S. app downloads on a piece of  
15 paper, and I'm going to get up and show that to the jury.  
16 The jury is going to have no context when Tim Cook gets up  
17 and talks for an hour. He talks for 30 minutes about apps.  
18 You know, they are not going to have that context.

19 I'm trying to give them context for here is them  
20 talking to the world and here is what they say. And he wants  
21 me to take their internal document that says this is how many  
22 app downloads.

23 So they are going to criticize by saying it is  
24 battery life, it is screen size, it is this, it is that. I  
25 think it is fair that there is like a ten-minute window in

1 there where he is just talking about the app developer market  
2 and how critical it is to Apple and how an iPad or an iPhone  
3 wouldn't be an iPad or an iPhone if it wasn't for the app  
4 developers. I mean, I can't get that from a piece of paper,  
5 and that is what is critical there.

6 MR. ALBRITTON: And all of the things he just  
7 described they can get without getting into the specific  
8 number of worldwide downloads.

9 THE COURT: That was my next question.

10 MR. CASSADY: He sits there with it behind him on  
11 the screen the whole time. It said a billion apps  
12 downloaded, and he talks about the app market and the app  
13 environment and he goes through it, and I just don't see why  
14 a number -- I don't see what is prejudicial about that  
15 number.

16 And I'm not sure about this case, but I mean, I  
17 think their downloads come from a United States server  
18 anyway, so I'm not sure that that is even -- the  
19 extraterritorial thing is even covered through app downloads.

20 THE COURT: Okay. Okay. Well, y'all please keep  
21 working on this. If he is sitting back there with it behind  
22 him on a screen the whole time, I'm not going to cut out that  
23 whole stuff because he -- just because it is behind him on a  
24 screen.

25 I would like you to work on maybe not using that

1 one sentence about the billion app downloads. See if you can  
2 find some middle ground on that. So leave that one out, but  
3 maybe he can say some of the other things that he spends a  
4 great deal of time talking about app downloads.

5 MR. CASSADY: Thank you, Your Honor. That is what  
6 I need. That is the guidance I needed. Thank you very much.

7 THE COURT: All right.

8 Okay. What is next?

9 MR. CALDWELL: Your Honor, Brad Caldwell. Looks  
10 like I have one of these now, and I think this bucket  
11 consists of one drop. So it is Defendant's Exhibit 208.

12 If we could, could we pull that one up?

13 Your Honor has seen this document probably in a  
14 more legible size -- there we go -- a few different times.

15 What this document is, in 2009, late 2009 when  
16 Mr. Racz was talking with one of the companies he considered  
17 doing a deal with, what happened was I think that they  
18 basically agreed to an agreement in principle.

19 Then the other side comes back to them and says,  
20 well, here is a little prior art patent I want you to look  
21 at. And this is where he writes back and says: I don't  
22 think that has anything to do with mine. It doesn't fit in  
23 with mobile phone infringements. It doesn't have the paying  
24 for invalidated content wirelessly to a mobile phone, for  
25 example. It is different. I don't see how it is the same.

1 It is different.

2 But then he says on the next page, from our  
3 perspective it is simply a prior publication. It is not what  
4 we are doing. In the event you disagree, we can see some  
5 other options, but the options to follow would depend on U.S.  
6 litigation tactics.

7 Mr. Batchelder really likes number one. I mean, he  
8 has read this to you on three or four times in the past.

9 But what happened was in this bullet number 1 as  
10 his first alternative to his actual belief, Mr. Racz says:  
11 Well, one thing we could argue is that a data carrier is an  
12 intermediate device.

13 We could argue that for '720, Claim 1. I don't  
14 know that this applies to other claims because we think  
15 Claim 3 is broader, for example. Then he goes on to do other  
16 things.

17 And at the top of the next page.

18 If you would.

19 At the top of the next page he says: Look, it is  
20 good that we are identifying prior art now. That helps us  
21 assess everything. But have your company run this issue past  
22 a skilled U.S. litigator to look at and deal with. We could  
23 expect some positive suggestions there.

24 What was happening was and the thing that  
25 Mr. Batchelder likes to say, oh, Mr. Racz and his lawyer

1 drafted this.

2 What happened was when he was considering doing  
3 this deal is --

4 If we go back to the top of Page 1, if you don't  
5 mind. I'm sorry.

6 There is a little intro nugget at the top of Page  
7 1. Very top. Right there. It says Erik, please note the  
8 following comments...Patrick.

9 And then, essentially, he pastes in something that  
10 is drafted by his UK lawyer, and that's how he testified in  
11 his deposition. And the UK lawyers don't understand the  
12 American claim construction law. That's why they also come  
13 back and say talk to the U.S. -- the skilled U.S. lawyer  
14 about this thing.

15 My point is simply that maybe there are just  
16 redactions that could handle that, but I don't know that we  
17 have to have a big fight over this. But every time this  
18 document has come up in the case it has been with  
19 Mr. Batchelder saying you have to read in this intermediate  
20 device, removable card thing on data carrier based on this.  
21 And this is that same piece of extrinsic evidence that we  
22 have talked about few times that you have kept out.

23 And I understand their position. I have done  
24 nothing but take them at their word that they are not going  
25 to argue claim construction to the jury, but I think that is

1 literally the only thing we have ever heard about that  
2 portion of this document, so at least that should be redacted  
3 or the document should just be excluded under the  
4 already-granted Motion in Limine No. 1 from Smartflash on  
5 claim construction.

6 THE COURT: Okay. Response?

7 MR. BATCHELDER: Your Honor, this conversation  
8 starts with a third party saying to Mr. Racz, we are  
9 concerned -- you have asked us to invest money in your  
10 patents. We are concerned that your patent is invalid in  
11 light of a given prior art reference.

12 Mr. Racz responds by saying, no, actually our  
13 claims are distinguishable. That is relevant to several  
14 things, including willfulness here; that third parties in the  
15 industry are reading these patents and concluding they are  
16 invalid.

17 So we do like this document. We think it is  
18 relevant to a variety of issues, but that is at least one of  
19 them, and we think there is no basis to exclude it for that  
20 purpose.

21 But, as I say, if Mr. Caldwell has redactions to  
22 propose, I am happy to consider them so he can continue to  
23 work on that if Your Honor would like.

24 THE COURT: Yeah, I mean, have y'all not -- have  
25 y'all not talked about possible redactions to this document?

1           MR. CALDWELL: My proposal is very concrete, and it  
2 just relates to this bullet point 1 that Mr. Batchelder  
3 always cites on claim construction. You know, I think this  
4 is one of the instances -- like I say, we have tried to  
5 tailor down our objections, and this is one of the ones where  
6 my understanding is we weren't objecting to this chain  
7 because what originally happened was Mr. Racz agreed to a  
8 deal in principle, and then they came back and tried to  
9 rework the deal; and when he saw that, he said, look, I think  
10 what you are saying is nonsense on this prior art; but he  
11 also just walked away from it.

12           My proposal on redaction is that simple. We always  
13 point to this number 1 and say, oh, a data carrier, we could  
14 argue that is an intermediate device.

15           THE COURT: What about redacting that bullet point  
16 number 1?

17           MR. BATCHELDER: Your Honor, honestly, this is the  
18 first time I have heard that proposed. Could I ask to  
19 consider that overnight and confer with Mr. Caldwell?

20           THE COURT: Oh, overnight, yes. I really was  
21 hoping to resolve all of these. I'm worried that you are not  
22 going to resolve it, and I'm going to have another dispute.

23           MR. CALDWELL: That's my fear, too. I think it is  
24 a very discrete issue. I mean, how about if maybe --

25           THE COURT: At the next break.

1 MR. CALDWELL: After the next break --

2 MR. BATCHELDER: I will look at it over the break,  
3 that's perfectly fine.

4 THE COURT: Okay.

5 MR. BATCHELDER: Do you have a hard copy?

6 Okay. We have got it. Thank you.

7 THE COURT: Okay. Then what is next?

8 MR. SCHENKER: So, Your Honor, I think the last  
9 bucket on our list at this point are some of the agreements  
10 that we have come to in rulings today is a group of documents  
11 that were produced by Samsung and HTC in the other  
12 litigation. They weren't produced in this litigation, and  
13 they are documents that come from a different litigation  
14 altogether; and, you know, we don't see kind of how or why  
15 they should be introduced as evidence in this litigation,  
16 what they are probative of with respect to the damages model  
17 against Apple since it is a different damages case against  
18 Apple, and they are using it against Samsung and HTC, as far  
19 as I understand.

20 You know, we have generally had an agreement just  
21 keep separate and apart and stay away from the other  
22 litigations in general, so I am not really sure why the  
23 documents produced in that litigation really should be  
24 brought into this litigation altogether.

25 THE COURT: What kind of documents are they?

1 MR. SCHENKER: They are marketing documents, I  
2 think survey documents. I think we can pull up some  
3 examples.

4 MR. CASSADY: What number?

5 MR. SCHENKER: 96 is the first one.

6 I mean, in some of these categories there is a  
7 large number of documents. I don't know if you want to go  
8 through all of them.

9 THE COURT: Okay. Well, we don't need to go  
10 through the specifics just yet. I was trying to get a feel  
11 for -- your general categories are helpful. Marketing  
12 documents.

13 Is this one right here PX 96?

14 MR. SCHENKER: Yeah.

15 THE COURT: All right. Well, let me get a response  
16 on that then.

17 Mr. Stewart.

18 MR. STEWART: Your Honor, Chris Stewart for  
19 Smartflash. This issue may sound familiar to Your Honor  
20 because Your Honor has taken it up I think three separate  
21 times in the reverse order with Samsung and defendants in the  
22 Samsung case arguing about Apple documents being exchanged  
23 over there.

24 It is basically the exact same argument. They have  
25 exchanged these documents. They saw them before expert

1 reports. Mr. Mills relied on these documents in his expert  
2 report.

3 If we could go back to Page 2 of this document, you  
4 would note that it talks about beating Apple as a primary  
5 goal of Samsung; and it talks about the competitiveness of --

6 THE COURT: Why is that relevant in the Smartflash  
7 v. Apple case?

8 MR. STEWART: Because the perception of Apple's  
9 competitors about the importance -- or the success of Apple  
10 and the importance of the accused features to Apple's success  
11 and to their competitive advantage, just goes to show that  
12 these accused features are valuable and are essential to  
13 Apple's products.

14 And, Your Honor, I didn't actually note that  
15 comparison earlier when Mr. Batchelder was talking about  
16 Apple's awards. Now, there are two products that are  
17 competitors both that Smartflash contends infringe. They  
18 want to show why their products are better because of other  
19 features, and we want to show that, in fact, their products  
20 in their competitor's minds are better because of the accused  
21 features.

22 THE COURT: All right. Well, let's just take a  
23 couple of these head on then.

24 Explain to me about this one, for example, why this  
25 Samsung document, and particularly this page, is relevant to

1 you in the Apple case.

2 MR. STEWART: So, sure, Your Honor, this page is  
3 one page of several in this document that talk about beating  
4 Apple, talk about that being the sole focus of Samsung in  
5 their endeavors over the next course -- over the next few  
6 years.

7 THE COURT: And I get it. I mean, they are  
8 competitors, right? Wouldn't everyone assume that is  
9 Samsung's goal and it is probably Apple's goal? I mean, what  
10 is the tie --

11 MR. STEWART: Right. I hesitate because I am not  
12 sure I can point you to a specific slide, although Mr.  
13 Cassady can help me out.

14 THE COURT: Anyone can jump in.

15 MR. PEARSON: I believe we are looking for the  
16 slide, Your Honor, but this particular document talks  
17 about -- it is specifically relied on and discussed at length  
18 or at least in paragraph form, more than just a bare citation  
19 by Mr. Mills, for the premise that at least Samsung believed  
20 when it made this document that when one of the accused  
21 features was released by Apple -- I believe it was the App  
22 Store, and we can find the page -- Apple's sales jumped by 42  
23 percent.

24 And we think that is very good and strong evidence  
25 of the value and the importance of these features -- or at

1     least that was Mr. Mills' interpretation when he was citing  
2     about it.

3             THE COURT:   That he relied on this exhibit and in  
4     some detail talked about the page you are currently looking  
5     for.

6             MR. PEARSON:   Definitely.   And I can also, I think  
7     fairly represent to the Court that there are some documents,  
8     such as this one, that legitimately were discussed in  
9     paragraph form and quoted and whatnot.   There are some other  
10    ones that might have just been cited in footnotes that,  
11    obviously, we think contain valuable information.

12            But I am going to be honest, there are probably --  
13    some of those are on the chopping block now that we have to  
14    reduce our exhibit numbers.

15            MR. STEWART:   And, Your Honor, I just would point  
16    out, too, that these documents work in tandem to the extent  
17    that some of them discussed the importance of the accused  
18    futures to Apple's success and others maybe do just touch  
19    generally on the competitiveness of those competitors with  
20    Apple.

21            It is those two concepts in combination that  
22    actually lead to the conclusion that these features are  
23    important.

24            THE COURT:   All right.   Mr. Schenker, while they  
25    are looking for that piece of this document, give me your

1 response.

2 MR. SCHENKER: Well, so I guess two responses  
3 initially. I understand that they are saying Your Honor has  
4 kind of approached these documents a number of times before.  
5 But my understanding is that each time this was dealt with  
6 was in the aspect of discoverability of these documents,  
7 which really doesn't get to the admissibility of these at  
8 all.

9 I don't think Your Honor has at this point at all  
10 ruled that these documents should just be admissible just  
11 simply because they are discoverable.

12 THE COURT: All right.

13 MR. SCHENKER: In terms of the last point that if  
14 there are some documents that might have been subsequently  
15 talked about, there are other documents that maybe were -- we  
16 think they kind of go hand in hand. It sort of undercuts  
17 this entire thing that there are a lot of documents that  
18 don't really have a relevance, that haven't really been  
19 discussed; and we have got, instead, this large bucket of  
20 documents that were never produced in our case, entirely for  
21 another litigation, and haven't been through the same kind of  
22 discovery --

23 THE COURT: Let me just generally give you a ruling  
24 or some guidance on these. If there are documents like this  
25 ones you are telling about where Mills has at length or at

1 some length opined or used them, relied on them, talked about  
2 this 40-percent jump in sales, I see the relevance of that.  
3 It can come in.

4 But if there are kind of a set of documents that  
5 are more generally or really minorly relied on, I think those  
6 are not going to come in.

7 Does that make sense?

8 MR. CALDWELL: And that applies to both parties --

9 THE COURT: Yeah, and I think I have sort of ruled  
10 consistently that way on several issues today. I mean, if  
11 you have got an expert and he is really talking about this  
12 document and he is showing why that jump in sales is  
13 relevant, okay.

14 But if it is just 20 documents that were produced  
15 in the Samsung case and you think it shows that they are  
16 competitors and Apple wants to beat them, well, okay, we got  
17 that. That is not coming in.

18 MR. CASSADY: Your Honor, just to tie the knot on  
19 this one.

20 Can you switch over to our doc camera now?

21 Okay. Zoom on this bottom left piece.

22 This is a Samsung document, and here is a good  
23 example. The App Store launch in 2008 had a direct  
24 contribution of 42 percent unit share lift to Apple.

25 I mean, that is your competitor saying we think

1 your lift of sales is directly related to an accused feature.  
2 It is what Mr. Pearson was describing. And I think you  
3 already ruled on it. I just want to show it to you because  
4 that is what we are talking about.

5 These kind of documents Mr. Mills goes in detail  
6 about throughout his report. Other ones, I will agree, there  
7 are occasions where he cites five documents, and he doesn't  
8 go into some of those details.

9 THE COURT: So we are about to take a break, and  
10 what I want you do is -- with regard to this category of  
11 documents -- see if you-all can agree which ones are  
12 significantly talked about by Mills and would under this  
13 ruling be admissible and which ones are not. So what we  
14 don't have is you later not having an agreement about my  
15 ruling.

16 MR. CASSADY: Okay.

17 THE COURT: Mr. Schenker, what are you --

18 MR. SCHENKER: If I may respond. I mean, I  
19 guess --

20 MR. PEARSON: I have a proposal that would be kind  
21 of easy, I think --

22 THE COURT: I like it. I like easy.

23 MR. PEARSON: -- clear cut. That if Mr. Mills  
24 quoted something in a paragraph or includes excerpts of  
25 quotes in a footnote where there is like actual text from a

1 document that made it into his thing, not just bare  
2 citations, maybe that is a clear line we can agree on.

3 THE COURT: I think that is good. We are going to  
4 talk about it at the break.

5 Mr. Post.

6 MR. POST: We will talk about it over the break. I  
7 am not sure we can -- we will talk about it.

8 THE COURT: All right. This is my guidance: If  
9 Mills is generally relying on it and he is using it in part  
10 of his analysis, it is going to come in.

11 And also, Mr. Batchelder, you were going to look at  
12 the possible redaction of that one email over the break.

13 MR. BATCHELDER: I will.

14 THE COURT: All right. We are going to take  
15 another break, 15 minutes.

16 (Recess was taken at this time.)

17 THE COURT: Please be seated.

18 All right. Hi.

19 MR. BATCHELDER: Your Honor, I am at the podium  
20 because I am delighted to report not one, but two  
21 agreements.

22 THE COURT: Yes.

23 MR. BATCHELDER: The first is, as to the opposed  
24 proposed redaction by Mr. Caldwell on the Racz/Gregg email,  
25 that is DX-APL 208. He had proposed redacting paragraph

1 number 1. I pointed out to him that paragraph number 4 also  
2 deals with claim language and claim interpretation, and if 1  
3 is going to come out, we think 4 should, too. And he agreed.

4 So what we agreed is that we would take out  
5 paragraphs 1 and 4, and then also to avoid to the Judge and  
6 Jury that there are holes in the documents; that actually the  
7 numbers of those paragraphs 1, 2, 3, 4, 5, they can also come  
8 out. So just the remaining text can be there.

9 THE COURT: Very good.

10 MR. BATCHELDER: So that is agreement number 1.

11 And now agreement number 2, Mr. Cassady will  
12 correct me if I misstate this, but I think we agreed on  
13 wording on the comparative language, so I think we agreed  
14 that we can get in the notion that Smartflash says that this  
15 Apple product and that competitor product, like that Samsung  
16 product, practice the patents-in-suit and could say that this  
17 Apple product and that Samsung product practice the  
18 patents-in-suit with the same feature, with those kinds of --

19 MR. CASSADY: "Says" is the word, that is fine. We  
20 are okay with "says."

21 THE COURT: Good.

22 MR. BATCHELDER: Okay.

23 THE COURT: Good job. Thank you.

24 MR. BATCHELDER: Thank you.

25 THE COURT: All right. Am I right we have one more

1 bucket left?

2 MR. STEWART: Well, Your Honor, actually we had one  
3 more thing we were supposed to discuss over the break --

4 THE COURT: Yeah.

5 MR. STEWART: And I'm actually going to be the  
6 bearer of bad news.

7 THE COURT: No.

8 MR. STEWART: And say we didn't quite resolve that  
9 issue.

10 THE COURT: All right, Mr. Stewart.

11 MR. STEWART: There was the issue of these Samsung  
12 and HTC documents that Mr. Mills actually relied on.  
13 Apparently we couldn't come to an agreement as to a  
14 bright-line rule. We think to the extent it is other  
15 documents that are either quoted or there is a substantive  
16 discussion of documents, followed by a citation to one of  
17 these Samsung or HTC documents, that should be the  
18 substantive discussion that satisfies Your Honor's ruling.  
19 And, as we understand it, Apple disagrees with that.

20 THE COURT: All right. Mr. Post.

21 MR. POST: Very briefly. I think we have two  
22 issues with these types of documents. I don't think there  
23 are very many, frankly, in Mr. Mills' report at this point.

24 But they are -- as far as this litigation  
25 is concerned, they are third-party documents. That

1 particular one that you saw, I don't want to put them back up  
2 on the screen because they do contain Samsung  
3 highly-confidential information, I understand.

4 We do have Apple folks here today with us, which is  
5 another issue I think how they are going to be used at trial.  
6 I don't know that we can shepherd the confidentiality of  
7 third-party documents. But they are -- that particular one  
8 was an embedded hearsay document.

9 We have produced 6-million-plus pages of  
10 documentation in our case. We have produced, as the exhibit  
11 lists demonstrate, multiple surveys, marketing studies. If  
12 there is information from Apple's own documents that they  
13 want to use and cite, they have done that. We don't see the  
14 need of using these third-party documents essentially in  
15 place of Apple information. We don't have discovery from  
16 them, and we have these hearsay and confidentiality issues.

17 So that is our issue. I don't think it is a  
18 tremendous number of documents at this point given what they  
19 have narrowed down to, but we do think that those still ought  
20 not be showed.

21 THE COURT: Okay. What are the documents, and let  
22 me see them. If we are not going to put them up on the  
23 screen, let me see a physical copy.

24 (Pause in proceedings.)

25 MR. POST: If it is easier, we can have our two

1 folks step out so we can put them up on the screen.

2 THE COURT: Okay. Thank you.

3 Now, okay, before we get into this, my wise Court  
4 Reporter is telling me, is this something that needs to be  
5 sealed or are we talking about --

6 MR. POST: Well, let's see if we can put it up on  
7 the screen and talk about it without saying the actual  
8 specifics.

9 THE COURT: Okay.

10 (Mr. David Melaugh and Ms. Cyndi Wheeler left the  
11 courtroom.)

12 MR. STEWART: So, Your Honor, has already seen  
13 Exhibit 96.

14 Can we pull up 104.001?

15 Oh, right, so, Your Honor, can we actually have a  
16 ruling on 96? You have already seen that one.

17 THE COURT: Okay. Well, let's look at 96. 96 was  
18 a how-many-page document, and we looked at that one page of  
19 that document and talked about one snippet of that page, so  
20 let me see it.

21 So 96, Mr. Mortensen.

22 So is this the end?

23 TECHNICIAN: No, that was the page --

24 MR. STEWART: Okay. So that was -- a page on the  
25 end you have already seen, the beginning at Page 1 about

1 competitiveness --

2 THE COURT: All right. I see the indication that  
3 says PX 96-1. Then the page shows PX 96-89. So are you  
4 telling me -- am I -- can I assume that I was looking at the  
5 89th page in that one exhibit just now?

6 MR. STEWART: Yes.

7 THE COURT: So it is a more-than-89-page document?

8 MR. STEWART: That's right.

9 THE COURT: Tell me why the whole thing is  
10 relevant.

11 MR. STEWART: Your Honor, to the extent that the  
12 competitive nature of the Samsung and Apple relationship is  
13 continued to be discussed in interim pages prior to that 89th  
14 page talking about the specific feature or the specific  
15 aspect of those products, that creates that competitive  
16 disadvantage.

17 THE COURT: What I am going to need you to do,  
18 though, is tee up for me the relevant portion of this  
19 document that you need and -- because it is replete with  
20 hearsay and all kinds of potential issues. I have no idea.  
21 I can't look at it. It is 89-pages-long-plus.

22 So what part of the document do you need and why?

23 MR. STEWART: Your Honor, I apologize.

24 THE COURT: That's okay.

25 MR. STEWART: I'm simply unable to do that.

1 THE COURT: Mr. Cassady.

2 MR. CASSADY: Your Honor, I mean, there are many  
3 pages that have this kind of beat Apple, here is how Apple is  
4 beating us tone. I don't have the ten or so of those  
5 memorized, and we can get the expert report out and show the  
6 citations.

7 They know which ones they are. It is the same  
8 thing we have been citing the whole time. It is the 42  
9 percent of the market -- of Apple's market is because we let  
10 them beat us to this specific feature, various aspects of  
11 that.

12 The hearsay objection, though, this isn't for the  
13 truth of the matter asserted. This is for your competitors  
14 believe that this is the advantage you got from this feature.  
15 Whether it is true or not, that is irrelevant. It is the  
16 fact that your competitors in the space thought this and that  
17 is why -- that is what we are looking for here.

18 So Apple is going to -- just like what we just  
19 talked about and agreed to, they want to talk about how,  
20 well, if they have got the feature, then how can we have  
21 motivated anybody? This goes to before they had the feature.

22 And they admit that they think that the other  
23 people were motivated to buy Apple because they didn't have  
24 the feature. So there are pages like that. We can go to  
25 that last -- I mean, that page that has the 42 percent, that

1 page is a very specific example. That 42 percent shows up  
2 two or three other times in this document and has different  
3 import when it shows up.

4 But, I mean, a perfect example is this one here.  
5 Focus on the building. I can't remember what CNS is right  
6 now, but I think it is software offerings and broadening the  
7 ecosystem preference and showing market competition. I don't  
8 see anything objectionable on here.

9 And then we have the App Store launch in 2008 had a  
10 direct contribution of 42-percent unit share lift to Apple,  
11 and so --

12 MR. STEWART: Your Honor, if I could add just one  
13 more thing -- just, obviously, Your Honor's wishes with  
14 respect to looking at the individual documents trumps  
15 whatever our agreements were. But I do want to point out  
16 that when we agreed to bucketize these objections, the idea  
17 was there was an agreement between the parties that these  
18 buckets all rose and fell based on the same general  
19 principles.

20 They objected to the prejudicial nature of these  
21 because they were cross-produced. I understood Your Honor to  
22 sort of resolve that objection, so that is why we didn't  
23 necessarily prepare to talk about every single page.

24 THE COURT: I understand that. That's a fair  
25 point, Mr. Stewart. I guess what I am trying to do is I -- I

1 would admit this document, this page of this document. What  
2 I am worried about is what else is in this document that I am  
3 letting in? Is there something else?

4 Maybe that is just for Apple to tell me, there is  
5 something else in this document that is hugely prejudicial,  
6 and that is the part we want redacted.

7 MR. CASSADY: Yeah, if there is something else,  
8 Your Honor, we are happy to redact, just like we are with  
9 most of these other documents. That is the thing they know I  
10 want. There may be other ones that are very similar to that.  
11 Those are the statements I want out of this document.

12 If there is something prejudicial, I am not aware  
13 of it. And we are happy to redact and make it a less  
14 burdensome document.

15 But, I mean, objection to 89 pages is not exactly  
16 something to deal with --

17 THE COURT: Yes.

18 Mr. Post.

19 MR. POST: I think this one is about 140. And I  
20 think -- so we -- is it Your Honor's position that the  
21 embedded hearsay example of this little thing in the corner  
22 is going to be overruled.

23 THE COURT: In the same fashion, if Mr. Mills has  
24 relied on it and opined on it and talked about it, I am going  
25 to let it in just like I did in overruling their hearsay

1 objection to some of the things that your experts relied on,  
2 in the same fashion.

3 MR. POST: So I think, you know, for documents like  
4 this where they are substantial and there are lots of issues,  
5 whether they be prejudice, hearsay, that aren't relied upon  
6 by any expert, we would ask that those be redacted. And it  
7 may be -- especially for the ones that aren't even ours. We  
8 still have the confidentiality issue that we may have to work  
9 through. I'm hoping we can do that.

10 What I have done in other cases is if a document  
11 like that that is confidential, if a particular slide is  
12 used, then it is left in unredacted form. But everything  
13 else that is not used with the witness gets redacted. And I  
14 think that for these particular materials, that may be what  
15 we request.

16 Not just so much just -- you know, if Mr. Mills  
17 cited to six pages, maybe that is a starting point. But if  
18 all six of those aren't used with him as a witness, we would  
19 ask that those -- that they then be redacted. Just left to  
20 what was shown to him, what he testified about during the  
21 actual trial.

22 THE COURT: Given the nature of these documents  
23 that they were produced in another litigation and they are  
24 subject to other confidentiality issues, I think that is  
25 probably a fair request.

1 MR. CASSADY: Your Honor, I think the line -- just  
2 so it is clear, I think the line is going to be, you know,  
3 Mr. Mills says these documents supports his position. He is  
4 talking about this page and shows this page and a couple  
5 before this and talking about details that are related to  
6 this and how and why. At that point I think that evidence  
7 should be in the record.

8 I agree, I am happy to redact, you know, other  
9 things he is not at least mentioning or saying examples to  
10 the jury. It is just that line of how far we have to go for  
11 it to be there, but I agree. The vast majority is going to  
12 get redacted; and Samsung, I'm sure, will be watching our  
13 trial with bated breath, and they will be there to help  
14 protect their own confidential information, so...

15 THE COURT: All right.

16 All right. Is there another specific document that  
17 I should look at and give you some guidance on in this group?

18 MR. CASSADY: I mean, I would think with this  
19 instruction we would go back, and I think we would be pretty  
20 quick to get through the ones that he cites.

21 But unless they have got some specific issue that I  
22 am not aware of about these documents now that we are on the  
23 ones that are just literally talked about in his report.

24 THE COURT: Okay.

25 MR. CASSADY: Candidly, Your Honor, this is where a

1 lot of the candidates, I think -- given Your Honor's order we  
2 have to go down to 550. These is where a lot of the  
3 candidates are going to be; that we are going to isolate this  
4 to the six or seven or eight of them that he talks about in  
5 detail, and that is what we will do.

6 THE COURT: Okay. All right.

7 Then what is next? Now -- I was all excited a  
8 minute ago to say: Are we on the last bucket? Now are we on  
9 the last bucket?

10 COURT SECURITY OFFICER: Can the other couple come  
11 back in?

12 THE COURT: Yes, thank you.

13 (Mr. David Melaugh and Ms. Cyndi Wheeler return to  
14 the courtroom.)

15 MR. PEARSON: Your Honor, I am pleased to report  
16 that we are on Smartflash's last bucket.

17 THE COURT: You are the bearer of really good news.

18 MR. PEARSON: I am also pleased to report that  
19 there are two minor parts to this bucket.

20 May I please have the ELMO?

21 THE COURT: Yeah, you have got to turn it on over  
22 at the -- there you go.

23 MR. PEARSON: So what we are looking at there, Your  
24 Honor, is defendant's -- well, I am trying to -- sorry.  
25 There is a lot. That is the point.

1           Your Honor, we have defendant's final prior art  
2 elections, which are currently 20 references spread across  
3 the asserted patents, eight references per patent.

4           With the exception of one of these documents, which  
5 I am going to discuss in a second, we have no objection to  
6 the references that are actually used at trial being  
7 admitted.

8           However, we are requesting that today these  
9 documents not be preadmitted because we believe there is a,  
10 perhaps, strong -- at least a likelihood that this case will  
11 be streamlined more before we actually get to the trial. I  
12 think there is a very decent chance that not all of these 20  
13 references will be discussed in detail with their invalidity  
14 expert.

15           And in accordance with the Court's guidance from  
16 the previous hearing about state of the art, whatever is on  
17 this list now and that is not ultimately mapped claim by  
18 claim, we would say falls in state of the art and should not  
19 be in front of a jury.

20           I know they are not on the clock today to have  
21 elected precisely what is going in front of the jury, and  
22 that is fine. I'm not trying to stand in the way of them  
23 presenting their case. We just are concerned about a  
24 situation where in opening if all of these documents were to  
25 be preadmitted Mr. Albritton or Mr. Batchelder gives a very

1 good opening statement discussing 20 references and why they  
2 all invalidate the patents.

3 And then on the back end when it is  
4 Mr. Wechselberger's turn, you know, through no malice or  
5 whatever, there is only time for two references; and if they  
6 all got talked about in front of the jury, we would be  
7 severally prejudiced.

8 So we would just ask for the simple solution of not  
9 preadmitting them today, with the understanding that we do  
10 not intend to object to their actual use at trial.

11 THE COURT: So whenever they go forward on prior  
12 art, reference-wise, at trial, you will not object to their  
13 admissibility?

14 MR. PEARSON: Correct. That is currently on their  
15 list of final references with the exception of DX 31, which I  
16 would like to discuss in just a second.

17 Okay. So response as to just that part?

18 MR. SCHENKER: Your Honor, I guess I am not quite  
19 sure, you know, how this sort of comports with the rest of  
20 the preadmission process that we have been doing, the whole  
21 purpose of the preadmission process, which is to get things  
22 that should be into evidence preadmitted and admitted so they  
23 can be dealt with.

24 It doesn't change Judge Gilstrap's practices and  
25 the way Your Honor feels about Judge Gilstrap's practices, or

1 by only moving into evidence things that have been  
2 substantively talked about, it doesn't -- you know, change  
3 that. It doesn't all of a sudden let something in that  
4 shouldn't be otherwise in evidence.

5 But what we have got here are elected references  
6 that are under, you know, Apple's current elections which we  
7 can estimate we made the elections to be the appropriate  
8 number. This is exactly what is supposed to be preadmitted  
9 and exactly what the entire purpose of today's hearing is  
10 about.

11 I would note that Smartflash has already raised the  
12 prospect of, you know, we don't know exactly what we are  
13 going to present at trial in terms of infringement, and we  
14 don't know exactly what this case is going to be limited to.  
15 But we haven't gotten up and said you have got to not  
16 preadmit any of the technical documents because some of those  
17 technical documents might be about features or functions or  
18 products that they don't ultimately accuse.

19 And Mr. Caldwell or Mr. Cassady or whomever from  
20 their end, you know, Mr. Ward, can stand up in opening also  
21 and they would have the same prejudice of saying, look at all  
22 of these accused products and accused infringing features;  
23 and these are all there and their expert Dr. Jones might just  
24 get up and give evidence of one or two things.

25 I don't see how it is at all -- there is any equity

1 in this to allow that to happen.

2 THE COURT: So what about kind of a ruling in  
3 reverse that I preadmit the exhibit; but to the extent that  
4 defendant's further narrow their prior art references, we  
5 have an understanding that those exhibits would be pulled  
6 just as if you narrow your claims or asserted products,  
7 exhibits related to those would be pulled out of your exhibit  
8 list? Is there some way we can get to that in reverse?

9 MR. CALDWELL: I think that is fine with us. I  
10 think as further color on the argument from Mr. Pearson,  
11 another thing that would also be a problem is if it is  
12 preadmitted and it is in the record, and really the only time  
13 we hear argument about how it matches up to the claims is in  
14 closing, for example. I mean, that would seem to be  
15 inappropriate.

16 I think we are actually trying to do what Apple is  
17 saying we are not trying to do. We are actually here telling  
18 you you don't have to resolve something about hearsay and  
19 authenticity and that sort of thing. That is stuff we can  
20 assume is good. We just want to reserve the "does it go back  
21 to the jury" part for if there is a further reduction.

22 So I think the way you are approaching it is  
23 perfectly fine as long as -- we are saying we are just not  
24 going to use this as a back-door into that whole  
25 state-of-the-art unelected references kind of thing that we

1 have talked about before.

2 MR. BATCHELDER: Your proposal is fine.

3 THE COURT: Okay. We will do it that way then. We  
4 will preadmit these exhibits that are unobjected to, but then  
5 if at some point Apple reduces the number of prior art  
6 references, we will pull any of those that are pulled from  
7 the exhibit list. Okay?

8 All right. So let me hear about that one.

9 MR. PEARSON: Thank you, Your Honor.

10 May I please have DX 31?

11 One of the elected references, Your Honor, is a  
12 system, IBM plus Sony. This is an article about this system,  
13 and the article is from October 8th, 1999, I believe. And  
14 the situation here is we are objecting to the admission of  
15 this document because this document does not corroborate how  
16 the IBM plus Sony system worked at the relative time; i.e.,  
17 before our priority date.

18 If you look at the text of this article -- which,  
19 again, I apologize I can't read very well -- it talks about  
20 plan changes that are going to be made the following year by  
21 this Japanese company.

22 Those glasses are not going to help me.

23 I appreciate your patience, Your Honor. The fact  
24 is, there is a lot of "wills" and this is going to happen and  
25 that will happen and here are some statements about the

1 future. And all those future-looking statements do not  
2 corroborate how this system is working at the time of the  
3 article being written.

4 And I'm not trying to stop them from having Sony  
5 plus IBM as a reference. They have other articles that are  
6 about it that are also, you know, stuff off the Internet that  
7 is hearsay and unauthentic that I am not even bothering with.  
8 With respect to this one, we don't believe these statements  
9 actually corroborate the system at the appropriate time  
10 period.

11 THE COURT: Okay. Response.

12 MR. SCHENKER: Well, Your Honor, this exhibit talks  
13 specifically about the fact that Sony had released this  
14 memory stick. It talked specifically about the IBM EMS  
15 system which is the entire thrust of the IBM plus Sony  
16 election that has been made.

17 It has been cited in -- it has been cited Dr. --  
18 Mr. Wechselberger's expert report in terms of supporting his  
19 contentions there.

20 Additionally, it goes to the obviousness, or at the  
21 very least there is an obviousness argument that these things  
22 that both were in existence before this point and were around  
23 prior to the priority date, they would know how to modify it.

24 But more specifically it talks about the fact that  
25 the two systems could be used together and may have been used

1 together. And to the extent they got an issue of how does  
2 this actually support Mr. Wechselberger's position, it really  
3 is going to get to the credibility, and that is going to get  
4 to cross-examination as opposed to the admissibility of this  
5 reference.

6 Sorry. Also one other point. The document also  
7 notes that the agreement is between two companies that had  
8 been signed in the past in terms of putting these  
9 functionalities together.

10 MR. PEARSON: And it certainly says that the  
11 functionalities may be put together in the future, but it  
12 doesn't say the functionalities were put together before our  
13 priority date. It doesn't say that they had been.

14 To the extent it shows what is obvious to combine,  
15 this document could have been a separate reference; but by  
16 the terms of this document, it just doesn't describe what has  
17 happened and is being corroborated that exists at the time of  
18 this document.

19 THE COURT: Okay.

20 Any response? Mr. Schenker? Anyone who wants to  
21 jump in, jump in. Let me hear a final word on this.

22 MR. SCHENKER: I mean, I guess, again, it  
23 doesn't -- I don't think there is any claim that it doesn't  
24 talk about the fact that these functionalities -- that these  
25 functionalities were known at the time that it was known to

1 combine; that our expert has already opined on this  
2 combination and cited it directly in his reports.

3 I think it has been cited -- someone flagged it and  
4 it has been cited on Page 1 of his charts even. So it  
5 something that he has already contemplated to the extent he  
6 is relying on it and he establishes that, again, if they have  
7 a problem with how well he supported his theories and his  
8 ideas, I think that goes to cross-examination as opposed to  
9 admissibility.

10 THE COURT: All right.

11 MR. PEARSON: I am certainly not contesting that we  
12 talked about this document. I understand that. But I'm just  
13 saying the document doesn't purport to -- even on its face it  
14 just doesn't corroborate the system that existed during the  
15 pertinent time period.

16 THE COURT: Your objection is overruled. That will  
17 be preadmitted, subject to this agreement regarding further  
18 narrowing of elected prior art references, which we are going  
19 to talk about in just a minute.

20 But before we get off the subject of exhibits, have  
21 I been through all of the buckets? I don't want to think  
22 about buckets any more today.

23 You guys did a good job. I appreciate you trying  
24 to compartmentalize these documents and help the Court work  
25 through a large number of exhibits, and I appreciate y'all's

1 continued attempts to work and come to agreements on these so  
2 that we can get this case ready for trial.

3 So with that, though, what I need you to do now is  
4 get together and by next Monday I need -- in light of these  
5 rulings -- a plaintiffs' exhibit of what has been preadmitted  
6 and a defendant's exhibit list of what has been preadmitted.  
7 Okay? Narrowing your exhibits to the numbers that we have  
8 talked about and in light of the Court's rulings.

9 Okay. And so before we get into the few motions  
10 that we need to talk about, I want to talk to you about one  
11 of the other motions, which is this motion to have more trial  
12 time. And I am going to talk to Judge Gilstrap about that,  
13 but that was his ruling initially was the 12 hours, though it  
14 came from me. So I will certainly put those motions before  
15 him.

16 But I want to talk to both of you about getting  
17 this case ready for trial because we are going forward  
18 currently on somewhat like 19 asserted claims across six  
19 patents, a lot of prior art references.

20 I have heard talk that maybe there have been some  
21 attempts to meet and confer and further narrow that; and I  
22 just want a report on how that is going, if it is going at  
23 all.

24 MR. CALDWELL: I think, candidly, the  
25 meet-and-confer process on narrowing isn't going. I mean,

1     what happened was, when it was time for the pretrial  
2     disclosures, what we saw is -- we were requesting 14 hours,  
3     which is in the ballpark of what you tend to see, certainly  
4     in Tyler with Judge Davis and whatnot.

5             We know that Judge Gilstrap -- I think he just got  
6     through trying a case in nine hours a side two weeks ago, so  
7     I mean, we understand his preferences and are planning  
8     accordingly.

9             But, anyway, when we had 14 and they were at 24 or  
10    25 -- or we had 15 and they were at 25 -- whatever it was --  
11    on a call with Counsel for Apple -- I think it was Ms.  
12    Fukuda -- I just reached out and said, hey, listen, you know  
13    you are probably not getting that in the Eastern District.  
14    Is there some way we can converge on something we can  
15    propose?

16            And their response was that not with that many  
17    claims and the prior art. And I was, like, okay, well, get  
18    us this proposal for reduction. And, ultimately, they  
19    weren't able to get us the proposal because they wanted us to  
20    do a unilateral drop.

21            I think the thing is you can't just be -- you have  
22    to drop, and then after that we will see if we need to drop  
23    too. I mean, if we want to agree to something where  
24    everybody agrees to streamline it down, I think that is okay.

25            And also Your Honor snuck in an order on us over

1 lunch on the O2Micro, which certainly helps -- I mean, just  
2 to be -- to be completely honest that helps because it helps  
3 us shape what we would like to present at trial.

4 We are willing, in view of the O2Micro and I go  
5 back and I talk to Mr. Curry and other folks that are smarter  
6 than me, I am confident we are able to reduce; but it needs  
7 to be -- you know, it needs to be sort of a dance with two  
8 people, right? And if we can do that, I think we can work on  
9 a reduction.

10 There is another issue -- are you just wanting to  
11 talk about -- you are just talking about claim reductions?

12 THE COURT: I am and prior art reductions --

13 MR. CALDWELL: And plaintiffs' prior art witnesses.

14 THE COURT: -- and I am talking about narrowing  
15 this case for trial. I mean, because I don't know that in 12  
16 hours you are going to be able to meaningfully go forward on  
17 19 asserted claims and I don't know that you are going to be  
18 able to meaningfully -- and maybe you can. You guys are  
19 smart, good lawyers; but I want to know if you are working  
20 toward reducing this.

21 MR. CALDWELL: Well, I can tell you here, we are  
22 absolutely working towards and able to go try it in 12 hours.

23 THE COURT: Okay.

24 MR. CALDWELL: Okay. We understand we were  
25 assigned Judge Gilstrap. We understand Judge Gilstrap has

1     been doing this quite a lot in the last three years, and I  
2     think 12 is basically kind of where he is usually. And then,  
3     as I say, I know he did one in nine hours.

4             I talked to those folks about it, and, you know, it  
5     really wasn't that big of a deal. You just have to get  
6     cracking and not waste time. They picked a jury on a Tuesday  
7     morning, picked to go, and they had a verdict on Friday.  
8     They just worked at it hard. We have 33 percent more time  
9     than that, so I know we can do it, and that is what we will  
10    be working on.

11            Now, as to the complexity issues, it is interesting  
12    Apple says we have some claims with 22 elements. Well, we  
13    do. I mean, a lot of it is sort of trivial. It is like you  
14    have a display. But there are several elements.

15            But the fact is, when you prove one of those claims  
16    basically, one of the lengthy claims, each of those elements  
17    is just reused in the other ones. That is essentially what  
18    they did in that nine-hour trial is they proved up certain  
19    things and showed the applicability to others. And we think  
20    both sides can do that. So I actually do think it can be  
21    tried in that amount of time.

22            And I have another issue with -- with respect to  
23    the Court not wanting to hear us on discovery fights. There  
24    is another issue I would like to bring up, and I can wait or  
25    do it now. But it relates to Apple's insistence that they

1 need all these witnesses.

2 Apple puts in their motion they have 10 people they  
3 simply must call. There are five people on their "will call"  
4 list that they filed with the Court. And I have a real issue  
5 with one of them. I don't want to derail your afternoon, but  
6 I feel like I need to tell you, because at the end of the  
7 last hearing, which was January 6th, I was arguing to  
8 preclude this witness, Mr. Ansell, who is this prior art  
9 witness on which they have only elected the four corners of  
10 the patent.

11 What we found out after the hearing, like a week  
12 after the hearing -- and I have got all this prepared to show  
13 you. It is entirely up to you -- what we heard in the  
14 hearing was they disclosed him at the close of discovery,  
15 five days left, we heard nothing from Smartflash.

16 What actually happened was we wrote them five times  
17 asking them about this guy. Then they say we put him on our  
18 witness list on September 16th. We heard nothing from  
19 Smartflash.

20 What we actually got was an email from them that  
21 says we will let you know if we have any subsequent  
22 discussions with these guys. We started pinging them  
23 periodically. Don't find out anything.

24 Way back in December -- so three months passed. In  
25 December we find out, oh, they represent Mr. Ansell. After

1 the hearing -- so mind you, the quotes are, we did nothing.  
2 They put him on witnesses. We did nothing, and we sat on our  
3 hands. And that was the ruling where Your Honor said at the  
4 very end it was a close call.

5 Six days after that hearing, Apple produces to us  
6 that they had hired this guy back in October. They paid him  
7 \$400 an hour as a fact witness. They have flown across the  
8 country to meet with him, talk about his book, sit down, have  
9 all sorts of preparations.

10 The next day they produced to us at our request the  
11 privilege log withholding about 12 or 15 communications with  
12 him. Substantive communications were on the privilege log  
13 that said we are talking to him about trial.

14 They have been doing that October, November,  
15 December, this whole time; and we come in where we were under  
16 a representation from Apple that they will let us know if  
17 they have any substantive discussions.

18 And we come into court, and I am told -- or you  
19 were told that I did nothing, even though I can show you the,  
20 I don't know, 15 emails we sent them about these guys; 15 or  
21 so, seriously, asking them. And asking them are they  
22 represented? Did you have contact with them? No answers, no  
23 answers, no answers.

24 We find out later after that hearing they had this  
25 guy in their hip pocket talking to him about trial, the whole

1 time.

2 Remember that back at the close of discovery with  
3 five days left, he was disclosed in a list of 32 prior art  
4 guys with five days left.

5 Then September 16th, cut down to a list of 11  
6 people on the "may call" list. Then they sign him up.

7 So two things I think are relevant: Honestly, I  
8 think under Rule 37 the appropriate result -- I think the  
9 appropriate result before was that he shouldn't be coming  
10 because anything he would say outside the four corners of his  
11 patent is improper under the Court's rulings.

12 Under Rule 37 in failures to disclose, that is an  
13 additional reason he should not be coming. He is definitely  
14 not necessary to Apple. And I don't want to use the "S" word  
15 and say we have got to have sanctions; but I think as to the  
16 way we were characterized, all of that can be dealt with  
17 post-trial.

18 As for trial planning, there is no reason that that  
19 guy -- he was on the margins of reason to call him anyway --  
20 under these circumstances should be brought to trial.

21 THE COURT: All right. Response, Ms. Fukuda.

22 MS. FUKUDA: So, Your Honor, I don't want to  
23 retread old ground. We have already talked about the  
24 relevance of Mr. Ansell's testimony. Your Honor has ruled on  
25 it.

1           Since then, Smartflash has had the opportunity to  
2 take Mr. Ansell's deposition for an entire day, so they have  
3 explored everything within his patent. And even though Your  
4 Honor said he can't go outside the four corners and he can't  
5 talk about the commercial Liquid Audio system, they have  
6 asked him many, many questions about the Liquid Audio system.

7           So, honestly, they had a full opportunity; and now  
8 that they have heard what Mr. Ansell has to say about his  
9 prior art, they don't want him to testify.

10           Now, I would like to address Mr. Caldwell's  
11 accusations about us hiding the ball. As explained to Your  
12 Honor, there were many, many prior art inventors on our  
13 elected references, more than 30. And it took time to try to  
14 see who we can reach, who we can realistically put together.

15           And we have produced all that information to them,  
16 all of the written communications. So it is more than just  
17 Mr. Ansell. It is Mr. Lotspiech. We had a handful of other  
18 witnesses. We have produced all of our written  
19 communications of those witnesses to them.

20           So, obviously, this is not a case of us taking one  
21 witness and burying him.

22           We worked through -- since August, September,  
23 October, November trying to reach out to who we can get in  
24 touch with, who is willing to come testify, who can spare the  
25 time, and how many, realistically, can we actually put on the

1 stand at trial. And as we have reduced that process down to  
2 fewer and fewer witnesses, we reduced our list as well.

3 And, Your Honor, they mentioned an exhibit -- or a  
4 witness list. We do intend to file an amended witness list.  
5 This is all information that we provided to Smartflash in  
6 terms of who we are actually going to be calling. So there  
7 should be no surprise that we want to formalize it in an  
8 official list to see exactly who we have on the slate right  
9 now.

10 So in terms of -- so we have had all of the  
11 communications that we have had with any prior art witness.  
12 The handful of communications that we withheld going back and  
13 forth with Mr. Ansell merely relates to our trial preparation  
14 materials. We are so close to trial that we started working  
15 on how to refine the testimony, what to hone in on. And we  
16 thought what we as Counsel, and Apple's Counsel, selected to  
17 focus on at trial was really our mental impressions and our  
18 trial strategy, that they are not entitled to.

19 Other things, we produced it all to them, produced  
20 all of the back-and-forth with Mr. Ansell. That is where we  
21 stand.

22 MR. CALDWELL: Your Honor, that "all that we  
23 produced" was after this hearing. I won't walk you through  
24 this.

25 But can you put up this PowerPoint?

1 I am not going to walk you through this. But I  
2 just -- I -- visually I think is super helpful. Let me show  
3 you just the part about the hearing, and then I won't go  
4 through the time sensitive part.

5 If you see on the far left, that is when they  
6 picked the Ansell patent as a prior art. That is way back in  
7 January. Then you see right at the close of discovery they  
8 add them with these 32 people.

9 I'm just going to focus on the hearing, and then I  
10 will just skip all the way to the end, just got to the end.  
11 At the hearing: What we did is we disclosed him within the  
12 discovery period with five minutes left. That was on August  
13 6th.

14 Okay. We heard nothing from Smartflash. In fact,  
15 then again on September 16th, Apple added him to the "may  
16 call" list. Again, we hear nothing from Smartflash.

17 At that point we're thinking it is a little late to  
18 be sitting on your hands. This is referring to when we  
19 talked to him in November as though we had just skipped to  
20 November.

21 And then they were the ones -- we decided to wait.  
22 I don't think we should suffer from the fact that they  
23 delayed the request. Then the Court ruled that it is a close  
24 call in light of the ruling on the motion in limine.

25 Now, the blue communications are us writing them

1 about these guys in this time frame, the time frame we  
2 allegedly sat on our hands. And I can go through all of it  
3 if you want. There is a couple that I put at the top just so  
4 you can see.

5           During this time we allegedly sat on our hands,  
6 after we had wrote them, I think, five times, we finally got  
7 this response that says: If we have any substantive  
8 discussions with any of the prior art inventors, we will  
9 notify you.

10           Okay. So then we get to the hearing. And you have  
11 just been told: We gave them all of these communications.  
12 You gave us the communications -- you gave us the  
13 communications on January 12th and 13th after the hearing, so  
14 that is when we got it. Like the night before Mr. Ansell's  
15 deposition is when we get all this.

16           Here is what it shows in terms of Apple working  
17 with Mr. Ansell. Each of the black communications are ones  
18 that we have that we have been able to see. Each of the  
19 white ones are the ones that they have withheld as privileged  
20 relating to preparing the guy for trial.

21           And Your Honor was told that we sat on our hands  
22 when you can see how many times we wrote them. Like I say, I  
23 will go through all of them if you want, submit it, whatever  
24 you want. Most of these are us asking them questions like:  
25 Have you been talking to the guys? Are they represented by

1 anybody?

2 Write them back like a few days later: Guys, what  
3 is your response?

4 Write them back a week later: Guys, what is your  
5 response?

6 One time I wrote them back 24 hours after Mr. Hamad  
7 had written them, and said: Guys, I'm sorry to bug you after  
8 only one day, but we asked you this three times in two weeks  
9 with no answer.

10 And finally they respond the next day, so that was  
11 that call. That is the call we have talked about previously  
12 with Mr. Albritton. We had a nice call. No mention of  
13 Mr. Ansell. No mention of retention.

14 And so when we then argued this last week, I thought  
15 the guy was completely inappropriate because all they can do  
16 is talk about the four corners of his patent.

17 I mean, you can see what has happened here. They  
18 disclosed these 32 guys with a few days left in discovery,  
19 tell us it is our fault for not deposing these 32 guys with a  
20 few days left in discovery.

21 Then the truth is, of the 32, there is about five  
22 of them, five or six, that they went out and signed up. They  
23 didn't give us any of that. We got all of that on -- we got  
24 all of the stuff from Mr. Ansell on January 12th and 13th,  
25 and we got the stuff from these other guys later, maybe

1 January 15th, all of it after the hearing. Never kept up on  
2 those duties of disclosure.

3 THE COURT: Okay.

4 Leave it up.

5 Ms. Fukuda, let's talk about it.

6 MS. FUKUDA: Sure. Your Honor, they have known  
7 about our list of prior art witnesses. They could have  
8 reached out to any of those guys at any given time. And that  
9 is the point of providing them notice because these are  
10 third-party notices -- these are third parties. And they  
11 know about them. They could call them.

12 In our correspondence what they didn't tell you is  
13 they didn't pick up the phone to try to reach any of those  
14 guys for months and months. What they want to do is to find  
15 out exactly what Apple is doing in terms of trial strategy  
16 and figure out who are the witnesses over time that we are  
17 trying to focus in on, why we want them. And we don't think  
18 they are entitled to our trial strategy.

19 Now, as of the moment right now, they have had  
20 access to all of our documents with these prior art  
21 witnesses, again, with the exception of a handful of  
22 documents that relate to trial-preparation-type material.

23 So I do not understand the prejudice here. They  
24 have had full access to Mr. Ansell. We have already been  
25 through this motion about the relevance of his testimony.

1 I'm not exactly sure what is missing here.

2 THE COURT: Is it true, though, that they were  
3 requesting reports of any conversations that you were having  
4 with these folks, you know, on all of these little blue dots;  
5 and that you were saying we'll get back to you except right  
6 here you weren't saying. Then they got all of that after our  
7 last pretrial hearing in January. Is that a true statement?

8 MS. FUKUDA: We made the production after the  
9 hearing because they finally knew that Mr. Ansell was -- they  
10 had not asked for a deposition up until then. We asked them  
11 to serve a subpoena. They didn't serve a subpoena until  
12 after the hearing and after Your Honor had ruled that he  
13 could testify. So at that point we turned over everything  
14 that we had with Mr. Ansell.

15 Now, in terms of our agreements beforehand, I know  
16 that there was an agreement between Mr. Albritton and  
17 Smartflash regarding the identity of these witnesses; and  
18 that they would not move to exclude any of the witnesses if  
19 we give them a deposition. And we had agreed to that.

20 And, Your Honor, I believe this came up at the last  
21 pretrial conference where that agreement was in place. And,  
22 as a result, we skipped over this argument back and forth  
23 about whether there was delay or not delay.

24 THE COURT: Mr. Caldwell.

25 MR. CALDWELL: I don't want to derail where you are

1 headed. As to the conversation, the person we were talking  
2 about was another guy Jeff Lotspiech. That is the guy we  
3 talked about. Now -- you know, we tried to reach something  
4 for similarly situated people.

5 But the thing about Mr. Lotspiech is, the Quinn  
6 folks had talked to him, too, a long time ago. And they -- I  
7 think the Quinn folks have produced to us their  
8 communications with him. And in those communications, there  
9 was some reference that he had also heard from someone at  
10 Apple; and we were able to figure out Lotspiech because that  
11 guy is arguably relevant because he is one of the guys on the  
12 IBM system that they have elected, as opposed to Ansell who  
13 is on the four corners of a patent. So it is very different.

14 And, I mean, obviously, sincerely, I will either  
15 give you the PowerPoint, I'll give you the documents,  
16 whatever you want to do. My point is that when they  
17 disclosed this to us at the eleventh hour of discovery, we  
18 did write them in this time period where we heard nothing  
19 from Smartflash, and specifically said: Guys, this is late.  
20 What are you trying to do? What is going on here? Have you  
21 talked to these people? Are they represented by counsel? I  
22 mean, that is the point of this.

23 And, honestly, what you will notice is -- what you  
24 will notice is at September -- September 11th is basically  
25 the last red one in September. You see that? Then there is

1 actually a lull there because we were pestering them  
2 non-stop. On September 11th they write us back and say:  
3 Listen, to the extent that there are any substantive  
4 discussions with any of these prior art inventors, we will  
5 notify you. And that is why we chilled out for a couple of  
6 weeks and went back -- I think the next one is Mr. Cassady  
7 saying: Look, you have still got these people on a "may  
8 call" list, what is going on?

9 I mean, it doesn't just happen you have a trial and  
10 a prior art guy who is not affiliated with any of the parties  
11 just shows up and says: Hey, I am here to take the oath and  
12 start talking.

13 That is why we knew -- a list of 32, I mean, that  
14 is not in good faith. And then when you start cutting it  
15 down, somebody has got to be talking to somebody if you are  
16 actually going to bring them in. And when they tell us we  
17 will let you know --

18 THE COURT: Okay. So let me ask this: Ultimately,  
19 you have not deposed him. I have limited his testimony  
20 substantially to nothing beyond the four corners of the  
21 patent, so what -- tell me about the prejudice and why I need  
22 to still exclude him.

23 MR. CALDWELL: Well -- okay. So I think there is a  
24 couple of points. I mean, one, we took his deposition under  
25 pretty non-ideal circumstances. Right?

1 I went and I took the deposition of Jeff Lotspiech,  
2 who is the person that Mr. Albritton and I agreed to in  
3 specific.

4 My colleague, Justin, went and I think he did a  
5 find job getting ready for Mr. Ansell; but we did that a few  
6 days after the hearing while we are trying to go to trial in  
7 the middle of briefing all these other things that are coming  
8 up, in the middle of trying to repair our damages thing from  
9 the Daubert situation. So all of that came in a situation  
10 where we had limited ability -- limited ability to prepare,  
11 limited ability to research him. And there is no reason it  
12 had to be that way, so there was prejudice in preparation for  
13 him.

14 Plus my other point is and the way we actually got  
15 into this is, Apple is alleging he is one of the people they  
16 simply must have and one of the reasons they need 18 to 24  
17 hours for this trial.

18 It is just hard to buy that, I mean, that this guy  
19 is a "must have" witness, so...

20 THE COURT: Well, my ruling remains that he can  
21 testify. He can testify on the very narrow issue of the four  
22 corners of the patent in that very limited sense, and that's  
23 it. We are moving on.

24 Now --

25 MR. CALDWELL: Your Honor?

1 THE COURT: Yes.

2 MR. CALDWELL: Can I have a clarification of  
3 another motion in limine that relates to it?

4 THE COURT: Tell me about that.

5 MR. CALDWELL: So I know that we have got this  
6 motion in limine on a privilege, just --

7 THE COURT: Not getting into something that would  
8 elicit a privilege --

9 MR. CALDWELL: Right. Right. Now, to be fair, I  
10 don't think that can -- I understand for an Apple engineer  
11 who goes to their lawyers in-house and says, hey, look, you  
12 know, I've got to show you the patent, to be fair, if Apple  
13 goes out and hires up these fact witnesses on prior art, I  
14 don't think the motion in limine can apply to that.

15 The notions of willfulness and opinions of counsel  
16 and a lot of the reasoning in that other line of privilege  
17 can't apply to, you go and start paying a guy, Apple pays the  
18 bills, pays Ropes & Gray. Ropes & Gray says you are  
19 retaining us, but don't worry, you don't have a bill. In  
20 fact, we will pay you, all of our talks are going to be  
21 secret, you can't tell anyone else.

22 We have to be able to make that point at trial that  
23 they have done that with the fact witnesses. And I don't  
24 want to be accused of violating the motion in limine, but  
25 obviously, when we worked that out last time, it was in the

1 context of Apple engineers who go and talk to their in-house  
2 department. It is not about, you know, these fact witnesses  
3 they have gone out to --

4 THE COURT: So let me just get this straight. I  
5 mean, there are fact witnesses and you have -- they have got  
6 Counsel retained, and it is Apple's Counsel, and there are  
7 some privileged -- I mean, give me the factual context for  
8 how this is going to come up at trial.

9 MR. CALDWELL: Well, what has happened is, for  
10 example, one of the first few questions in Mr. Lotspiech's  
11 depo is just basically like: Have you looked at Smartflash's  
12 patents? Okay. What did you look at? What did you read?  
13 Instruction not to answer -- I instruct you not to answer.  
14 It comes up in that context.

15 It comes up in the context of did -- were you  
16 directed to focus on any particular parts of your own patent  
17 in preparation for this deposition; or directed to certain  
18 things that were particularly applicable to Smartflash's  
19 patent in the invalidity case; and things like that.  
20 Instruction not to answer. Instruction not to answer.

21 And as to -- I mean, someone that Apple has their  
22 lawyers go out and seek out this person and say: Here is the  
23 agreement by which we will be paying you. Oh, by the way, it  
24 creates a privilege -- I mean, Mr. Lotspiech even referred to  
25 this agreement wherein he gets represented by Apple's Counsel

1 as I think the word was "silly" -- I mean, someone will  
2 correct me if I am wrong. He is like: I'm not sure it even  
3 works on privilege. I think it is kind of silly myself. Or  
4 something along those lines.

5 But as to -- I'm fine with it as to their  
6 engineers. That makes some sense.

7 THE COURT: I mean, are you asserting privilege as  
8 to communications with third-party fact witnesses?

9 MS. FUKUDA: Let me address a big portion of that  
10 and then Mr. Post can supplement as needed. But my  
11 understanding is that the primary issue here is work product.  
12 We are this close to trial, and a lot of what is happening  
13 would give a window into what our privilege is, so --

14 THE COURT: Well, but you walked that line in a  
15 fine way because this has all come to a head this close to  
16 trial. I mean, we can't fall back on that.

17 MS. FUKUDA: Understood. And so where we have  
18 drawn the line is they were free to ask any of the fact  
19 witnesses what the facts were. Tell us about your patent.  
20 We want to ask you about this particular passage or that  
21 particular passage, which they have done.

22 Where we drew the line was: Well, tell us what  
23 Apple's attorney told you to focus on. Was there anything  
24 there you are particularly interested in? Essentially, can  
25 we get into what it is that they are going to ask, you know,

1 what kind of questions are they going to ask you at trial?

2 They are not entitled to that because that is our  
3 work product. They can ask him any questions they would like  
4 to ask.

5 THE COURT: Okay.

6 MR. CALDWELL: I mean, I, frankly, think that all  
7 of that is actually fair game because each of these guys  
8 could have just been subpoenaed and we could have gone and  
9 taken their fact discovery, or we could have said: Would you  
10 be willing to come testify at trial?

11 What happened is Apple said you want some money for  
12 your time, here is the deal, you get it, here is this  
13 contract; and what it says is we can talk secretly, and you  
14 can't talk to them at all. And, I mean, if we can't make  
15 that cross point, that is just wholly, wholly unfair. To  
16 take these people that are presented as some third party and  
17 not be able to make that point, would be just wholly unfair,  
18 that they are trying to protect --

19 THE COURT: Okay. Well, this is just sort of one  
20 of those that really needs to be decided, I think, in the  
21 context of trial and their testimony, so I am going to leave  
22 the MIL as it stands; and before you get into that with this  
23 particular witness, bring it up to Judge Gilstrap because I'm  
24 having a hard time wrapping my head around that you-all have  
25 this kind of an agreement with a third-party fact witness.

1 But if you do, that it might be relevant in something that  
2 you are going to get into.

3 So anyway, the MIL stands. We are not going to get  
4 into discussions that elicit privileged responses unless we  
5 first bring them up to the Bench, so you just may have to  
6 take it up in the context of their testimony.

7 MR. CALDWELL: All right. So maybe just the scope  
8 of all of the allowable testimony, what would open the door,  
9 we should approach Judge Gilstrap maybe at the pretrial for  
10 him and take that up? Is that -- I mean, I'm not trying to  
11 defer it, but it affects us for cross preparation. I mean,  
12 and we are the ones that are -- we are the ones who tried to  
13 do this.

14 We are told -- we were told through silence in the  
15 face of an obligation to tell us there is nothing going on,  
16 and here we are dealing with it at the last minute. So, I  
17 mean, it strikes me as just wholly unfair that you could go  
18 and do that with these third parties; and that we can't -- I  
19 mean, getting into the privilege is one -- obviously, we can  
20 get into the compensation and all that. I mean, I think that  
21 is -- that should be beyond dispute.

22 But the fact that they can have secret  
23 conversations and the guy is contractually prohibited from  
24 even talking to us, I mean, not being able to explore that  
25 just seems wholly, wholly unfair. It wasn't our choice to

1 enter that agreement.

2 THE COURT: Okay. Response? Anyone?

3 MS. FUKUDA: Your Honor, I don't want to rehash the  
4 same arguments over and over again. We are happy to stand by  
5 the rulings you have already issued.

6 THE COURT: I'm actually probably -- with regard to  
7 these third-party fact witnesses, I'm going to carry this. I  
8 just want to think it through. I, frankly, have not ever had  
9 the scenario in front of me that I can recall where  
10 third-party witnesses have been retained and then we have got  
11 privilege issues with them. And maybe it happens all the  
12 time and I just haven't seen it yet, so...

13 Mr. Post.

14 MR. POST: Just one relevant fact for  
15 Mr. Lotspiech. He actually is in another unrelated  
16 litigation and happened to be retained as an expert witness  
17 by Apple. So there was one aspect of his representation is  
18 to make sure those privileged communications were protected.

19 He is not retained -- has no contractual  
20 relationship, I believe, or privilege relationship, at least,  
21 with Samsung. And has had discussions with Samsung. He was  
22 welcome and testified for hours about communications like  
23 that.

24 So the specific instructions not to answer  
25 questions in Mr. Lotspiech's case were in relationship to

1 trial prep -- deposition preparation, trial preparation  
2 issues like Mr. Ansell, as well as protecting his privileged  
3 relationship. But anything else as far as facts about the  
4 references, facts about the prior art system, was all fair  
5 game and he testified to that.

6 MS. FUKUDA: Your Honor, can I -- if you are going  
7 to carry the motion, let me just put in a couple of thoughts  
8 here.

9 One is that with respect to the retention, I know  
10 Mr. Caldwell has characterized it a number of ways but in the  
11 way he would like you to see it. I have kept silent on that  
12 issue; but now since you are carrying the motion, I do want  
13 to put it out there that when we reached out on behalf of  
14 Apple to try and get in touch with these third-party  
15 witnesses, we did not go out and say: Hey, can we pay you?  
16 You know, we want you to testify. Can we pay you? Never.  
17 We just said: Do you have relevant information? And, if so,  
18 what have you got? Would you be willing to come and testify?

19 Many -- almost all of the witnesses say this is  
20 going to cause me to miss time from work. I am going to lose  
21 money. I can't get that back. I know that preparing for  
22 trial takes a lot of work and time. I'd like to give  
23 whatever I can for the purposes of this case, but I would  
24 like to be compensated for my lost time.

25 And in situations where we felt that, you know, it

1 really isn't fair to let these witnesses to lose 20 or 30  
2 hours of time from work and get no compensation, we have  
3 agreed to just compensate them for their lost time.

4 They are not being paid for any time spent actually  
5 testifying, which they would be obligated to do. This is  
6 purely for preparation time to compensate for loss.

7 Second, Your Honor, regarding this whole privilege  
8 issue, I will make an offer to cut through all of this, there  
9 is nothing -- again, there is a handful of emails that we  
10 have redacted because we really think it gets into sort of  
11 the legal aspects of the trial preparation materials, but if  
12 it would help to resolve the issues, we can have that  
13 produced to them if Smartflash agrees that producing that is  
14 not some sort of general waiver into our trial preparation --

15 THE COURT: Response?

16 MR. CALDWELL: I don't think that that addresses  
17 the problem because I think Ms. Fukuda flew across the  
18 country to meet with him or maybe in -- maybe Palo Alto to  
19 meet with Mr. Ansell all day, and they sat down and talked  
20 all day. So I think that that is maybe a small part of the  
21 privilege part, but it is certainly not all of it.

22 If Your Honor is going to go back and think about  
23 this -- which I think makes perfect sense -- I would like to  
24 just ask that Your Honor -- I know you have already said you  
25 have ruled on it -- I would like you to think about the issue

1 of preclusion of Mr. Ansell. And the reason I say that is if  
2 under these facts that doesn't justify precluding him and the  
3 remedy was that we happened to have deposed him because they  
4 hid this stuff until later, what does that say about how we  
5 are supposed to disclose witnesses in other cases in the  
6 future? I mean, I am really worried about the endorsement of  
7 that.

8 And as to Mr. Ansell, I think one other point that  
9 Your Honor should consider -- I am glad -- I, honestly, just  
10 forgot. I'm glad Ms. Fukuda reminded me -- Mr. Ansell is  
11 signed up to make \$400 an hour when he testifies. The most  
12 he has ever made as a billing rate, which is what his company  
13 billed him for, was \$200 an hour.

14 When you annualize his salary and break it down,  
15 even if you take the highest average salary he makes and the  
16 lowest average hours a week he works, it comes out to like  
17 \$156. If you take the middle range, it is like \$125 an hour.  
18 The guy is getting paid two, three, four times more than what  
19 his rate is.

20 There are cases who have granted -- where judges  
21 have granted a mistrial on that purpose -- on that basis.

22 I, honestly, can't remember if Your Honor was with  
23 us in 2010 for the VirnetX/Microsoft case in Judge Davis's  
24 Court; but in the post-trial briefings -- in fact, it got  
25 settled right out from under this -- but in the post-trial

1 briefings there was a big issue there where Weil and  
2 Microsoft had compensated a witness Sami Saydjari, and I  
3 think it was more than what his rate was.

4 That is -- there are all sorts of ethical opinions  
5 that are saying that basically you can compensate the guy for  
6 the lost time that he is out, but paying a guy more than  
7 twice the peak of what his company has ever billed him for,  
8 that alone, I think, could be grounds for a mistrial, and  
9 that is still on this guy who was disclosed way, way late;  
10 all of the privilege stuff was held until late, et cetera.  
11 So I just would ask that Your Honor keep that in mind.

12 MR. ALBRITTON: I hate to do this, but we have got  
13 to make -- we have to make one thing clear. I don't know  
14 about all this. Okay? But one thing I know for sure is that  
15 the phone call Brad Caldwell and I had was not limited to  
16 that one expert -- I mean, I'm sorry, to that one witness.  
17 We were clearly talking about these 32 witness that they say  
18 we disclosed late.

19 It is nonsensical and just not accurate to say that  
20 we talked about one witness and our agreement was limited to  
21 one witness.

22 The deal we made was if we let them have  
23 depositions, they would not move to strike any of those  
24 witnesses. I am sorry to get into this he said/she said, but  
25 I was going to let it stop until we had to hear this again,

1 but that is just absolutely inaccurate, and it doesn't even  
2 make sense.

3 MR. CALDWELL: Okay. I know you hate this sort of  
4 part. Remember that as of September 11th we were told we  
5 will let you know if there is anyone else. There was one  
6 person we were aware of, which was Mr. Lotspiech. That is  
7 the only person.

8 And I think it was, what, the day before  
9 Thanksgiving, Eric?

10 And that was -- we find out about December 1 -- so  
11 it is about six days later is when we find out they are  
12 thinking that Mr. Ansell is like one of the guys they are  
13 actually likely to bring. It is another 10 days later,  
14 December 11th before we find out they actually had -- they  
15 represented him. And we thought they had just signed him up  
16 on December 11th.

17 It isn't until after the hearing, another month  
18 passes before we find out they actually had him in the pocket  
19 since way back in October.

20 So I understand we didn't talk about this is  
21 something that applies to Mr. Lotspiech and can never apply  
22 to anyone else. I agree with Mr. Albritton on that. I am  
23 trying to make a deal that avoids a fight in front of the  
24 Court based on what I know and the representations that they  
25 are making to me.

1           And then when I come back later and find out, okay,  
2           there is more to the story, then we have the hearing and I  
3           come back and find out there are like chapters and chapters  
4           that were written before any of these calls. That is where I  
5           have a real problem.

6           And what does it say about the duties of disclosure  
7           Rule 26, keeping things updated, keeping your production  
8           updated, in compliance with Rule 37 if you can do all this.  
9           I have just never seen anything that is even remotely,  
10          remotely like it.

11          THE COURT: Anyone have anything else to say about  
12          this?

13          MR. ALBRITTON: We were not meeting and conferring  
14          about one witness. They were complaining about all of them.  
15          And he just basically backed off exactly what he told you  
16          earlier that he and I were talking about one witness. That  
17          is just flatly inaccurate.

18          MR. CALDWELL: He is the only witness whose name  
19          even came up.

20          THE COURT: Okay. Ms. Fukuda?

21          MS. FUKUDA: The last thing, and I will sit down.

22          All of these questions about Mr. Ansell's  
23          compensation, they can feel free to go into crossing him with  
24          that. That is typical cross-examination to this line. In  
25          fact, Mr. Ansell had responded to all of those questions. He

1 explained it, why he charged the rate. He made it clear that  
2 he was the one that asked for that rate. There was nothing  
3 from Apple's side to try to, as they would call it, pay this  
4 witness. This is merely compensation for what the witness  
5 said in terms of time. So they are free to cross-examine  
6 him.

7 And in terms of prejudice, I don't really hear any  
8 because they talk about having to do his deposition quickly.  
9 The fact is they knew about his deposition for weeks and  
10 weeks. They had time to prepare for it, so I just don't see  
11 that there is prejudice, given everything we have discussed.

12 Thank you.

13 THE COURT: All right. I am going to carry this.

14 And, Mr. Batchelder, I'm going to let you have the  
15 floor to argue your motion.

16 MR. BATCHELDER: Thank you.

17 THE COURT: This is the motion to exclude the  
18 supplemental rebuttal report of Mr. Mills --

19 MR. BATCHELDER: Exactly. Thank you, Your Honor.

20 We will put up a slide deck if we could have

21 ours. All right. So this is a relatively short  
22 deck, Your Honor. I think this timeline really captures the  
23 main points. But before we dive into the detail here, let me  
24 just frame the issue, is that on Thursday night after our  
25 responsive expert reports on damages were submitted, we got a

1 brand new royalty rate calculation that, basically, evaded  
2 that response. And it would be highly prejudicial and it  
3 would turn the trial date on its head and we would have to do  
4 a lot of things if this doesn't get struck.

5 So here is the timeline. So on August 25th, on the  
6 far left entry, that was the Court deadline for burden  
7 reports that Your Honor had set.

8 And if we could go back.

9 And Smartflash served its opening Mills and Wecker  
10 reports.

11 On December 23rd, that was your Daubert order, and  
12 you ordered the amended report from Smartflash to be served  
13 in 15 days. That would be January 7th.

14 On January 6th at the pretrial conference, the day  
15 before those supplemental reports were to come in, you told  
16 us, look, we need to have all of this aired out. We need the  
17 new reports. We need them all settled by January 30th. And  
18 the parties agreed based on that guidance on what the  
19 schedule would look like.

20 Then the very next day we got their supplemental  
21 Mills and Wecker reports, new survey, and Mills had a royalty  
22 base calculated base -- you will recall that last time was  
23 based on this motivate question. And this time Wecker asked  
24 a new question that was almost identical but had inserted the  
25 word "alone," so he calculated royalty base from that "alone

1 motivate" question.

2 We then, pursuant to the schedule, on January 21st  
3 we had two weeks to respond just as they had two weeks to  
4 respond to your Daubert. And our folks conducted their own  
5 responsive survey. They tested that "alone motivate"  
6 question that Wecker had put forward and that Mills used as  
7 the basis for his royalty based calculation to show how  
8 people were really interpreting it; and that it doesn't  
9 justify reliance on the entire market value rule. It is  
10 wholly broken.

11 Then that was on the 21st night; and then the very  
12 next day, the night before Mills' deposition, I fly out to LA  
13 to take his deposition. I arrive at the hotel and log onto a  
14 computer and see there is this brand new royalty based  
15 calculation based on a different Wecker survey question that  
16 Mills had had all along, had thought about doing that  
17 calculation before and decided not to.

18 And because it was a different question, it wasn't  
19 the question targeted by the surveys that our folks had done.  
20 So their response reports were basically side-stepped by this  
21 new opinion that falls outside the Court's calendar, and it  
22 would be terribly prejudicial to allow that to go forward.

23 So let me just step through a few more slides and  
24 show you the context.

25 Next slide, please.

1           You will recall this piece of the slide that I  
2       showed you in the Daubert; that this was how Mills calculated  
3       his royalty base the first time around. Motivate question  
4       times total units times revenue of total units.

5           Next slide.

6           Everything reduces, so it just really just --

7           Next slide.

8           -- motivate times total revenue becomes his royalty  
9       base. That was true the first time, and that was really true  
10      the second time in the January 7th report, the same thing.  
11      It is just the motivate became the "alone motivate" question.

12          Next slide, please.

13          All he do was he took the original motivate  
14      question and added the word "alone" to it. And that is what  
15      Dr. Dahr testified in his responsive survey.

16          Next slide, please.

17          So Dr. Dahr did a survey to show how people are  
18      actually interpreting that. Samsung's expert did one, too.  
19      Both of them really came out with exactly the same results  
20      that debunk what they had done.

21          Next slide, please.

22          Then this is what Mr. Mills admitted in his  
23      deposition that I took on Friday about this. So he said he  
24      had had a phone call with Mr. Wecker and with Smartflash's  
25      Counsel either on the day of your Daubert or the next day, to

1 talk about your Daubert.

2 So I asked him, at the top quote: In that phone  
3 call, did you discuss asking a survey question directed to  
4 the subject matter of what is now Question 4B in Exhibit 4?

5 So that is the new one.

6 And he said: I believe we did. We had some  
7 discussion about the concept, anyway, of this question.

8 So that was in December.

9 Then next question: Were you thinking at that time  
10 that answers to such a question could be used in calculating  
11 a reasonable royalty?

12 ANSWER: I was thinking at the time that the  
13 answers could provide insight into a reasonable royalty, yes.

14 Then critically here, last question: Prior to  
15 signing your January 7th, 2015, supplemental report, did it  
16 occur to you to do royalty base calculations reflected in  
17 your January 22nd exhibits?

18 ANSWER: I had thought of the concept, yes.

19 So before the January 7th report that Your Honor's  
20 Daubert order allowed him to do, he had thought of this idea.  
21 He had the data. He could have done it. He decided not to.  
22 He waited. Our experts did responsive surveys to deal with  
23 what he did decide to do. And then he does the  
24 bait-and-switch, and we get this thing dumped on us over the  
25 transom on Thursday night, the night before his deposition.

1           Needless to say, if you don't strike it, we are  
2 going to have to do responsive reports, it would throw off  
3 the Daubert schedule, it would threaten the trial date, we  
4 would have to do another deposition. That would be an  
5 absolute mess. Frankly, untenable if we are going to keep  
6 this trial date. This really needs to be stricken.

7           THE COURT: Okay. Response.

8           MR. CASSADY: Your Honor, with regards to this  
9 specific issue, I think the timeline is pretty critical, so  
10 we'll just start back on Christmas Eve Eve.

11           So we got Your Honor's order with regards to the  
12 motion on the Dauberts regarding "alone motivate." And  
13 during that time frame of the motion in limine --

14           And could I get the document camera, please?

15           During that time frame of the Daubert, the argument  
16 had been the entire time, the entire time, that we needed to  
17 add the word "alone" to the motivate question, the entire  
18 time. That was the pivotal thing they kept saying. That was  
19 what Your Honor picked up on in the order was that we didn't  
20 ultimately have the word "alone."

21           So we went and looked at it and grabbed a couple of  
22 inserts from the Daubert here, says: Accordingly, for  
23 Mr. Mills' apportionment of the base to have been proper, the  
24 relied on survey question would have needed to ask whether  
25 the patented feature alone motivated.

1           Verhoeven, Counsel for Samsung/HTC, that argued on  
2   behalf of both parties in the Wecker depo -- or in the Wecker  
3   Daubert: Well, Your Honor, as you know, when you read the  
4   holding of LaserDynamics, there's a very important word that  
5   exists that was left out of the survey. And we are not  
6   talking about just the motivation -- sorry. Just the  
7   motivation. It has to be the feature alone motivates the  
8   buy. That's the law. That's LaserDynamics. There is no  
9   question about it.

10           Okay. So Christmas Eve we are sitting here having  
11   these conversations -- and, again, I'm not trying to blow my  
12   own work product, but we are having these conversations about  
13   what to do with Your Honor's order.

14           And, candidly, Your Honor, we said to ourselves,  
15   you know what, at a minimum, at a minimum we have to ask the  
16   "alone" question because I don't think it is fair to  
17   Mr. Mills and I think Mr. Curry said I don't think it is fair  
18   to Mr. Cass -- fair to Jason if we just let the Court think  
19   that we are trying to pull one on them. So let's ask the  
20   question with the "alone" and let's give that to her.

21           And that is what we did. We added the word "alone"  
22   to it; and then we also added a second question, which is the  
23   question we are talking about really here.

24           We added a second question, which is the one  
25   highlighted here: For each device listed below, what

1 portion, if any, of its value do you attribute to the  
2 capability to purchase from the App Store? Please answer  
3 your question from 0 to 99. So self-apportionment basically  
4 for the people who didn't say they were "alone motivated."

5 We didn't ask that question -- we didn't ask that  
6 question to create a separate royalty base. We didn't think  
7 we needed to create a separate royalty base. Our assumption  
8 was the surveys would come back, that data can be used  
9 ancillarily for other things; and given their testimony and  
10 their statements from the Court, we just had to add the word  
11 "alone." We didn't believe in a million years we were going  
12 to get 90 pages of new criticisms of our "alone motivate"  
13 question including a new survey being run and issues like  
14 that.

15 And we think those are wholly inappropriate given  
16 where everything was and the timing. If their criticism was  
17 that, why didn't they run that survey the first time? Why  
18 wasn't that survey run when they had a month from our last  
19 report -- from the first report to the rebuttal reports?

20 And they were laying in wait to tell the Court you  
21 are going to add the word "alone" in hopes that we couldn't  
22 run a survey over Christmas.

23 So we run our survey over Christmas and we get that  
24 "alone" word put in there.

25 And, like I said, Your Honor, we were shocked when

1 we got their surveys, this very, very vast amount of surveys  
2 that were rebutting things that they could have rebutted  
3 before, and they didn't do.

4 So we worked with them before we got the report.  
5 Before we got the report, we worked with their Counsel and  
6 said: How many hours do you need with Mills, given that you  
7 guys should have a pretty limited rebuttal?

8 Never did they say, oh, no, we're not going to have  
9 a limited rebuttal; we are going to have a lot of  
10 rebuttal. They kept saying: No -- yeah, we can agree to  
11 limit it, and we agree to four-and-a-half hours.

12 But very telling, the limitation of four-and-a-half  
13 hours, which was very, very specific by Counsel for Apple,  
14 and he said that --

15 Give me the highlighter, please.

16 They said -- I said: Thank you for chatting with  
17 me about the time limits for Mills' deposition. We don't  
18 believe this is very long, but we are willing to present him  
19 for four-and-a-half hours with the understanding that all of  
20 the expert depositions will be limited to the additional  
21 disclosure in the reports we can make -- with that we can  
22 make this offer.

23 They respond, and it is very critical to their  
24 agreement, we agree that -- we agree that all of the expert  
25 depositions will be limited to the additional disclosures in

1 their new reports. Any difference between the current and  
2 previous reports and even more importantly questions about  
3 the opposing expert's new report.

4 They specifically wanted this depo to be about  
5 that, questions about the report they were about to serve.

6 And the funny thing is, Your Honor, you are talking  
7 about the night before the deposition they get this report.  
8 We got their report 30 hours before this deposition. So we  
9 were lightning speed, and we got this -- we got this from  
10 them, we got his report; and they were served late, I will  
11 note. They were due at midnight. And we got Dahr's report  
12 an hour later, his reports were an hour late, he got the  
13 report 10 minutes late. And given when you are talking about  
14 a 30-hour time limit to prepare a witness for a deposition,  
15 that is a pretty critical, you know, one hour.

16 I would never complain about an hour on supporting  
17 materials being late; but when it is like that, that is  
18 pretty critical.

19 So what did we do? The next morning we are looking  
20 at it saying, oh, great. Like look at all this. We are  
21 going to have to strike all this. That is what we are saying  
22 to ourselves, we are going to have to strike all this because  
23 this is clearly meant to rebut something we did before and  
24 make us use this time to catch up and throw in a whole bunch  
25 of new opinions.

1           And that is what they did. And Gruse did it, Dahr  
2 did it, Becker; all of their experts did it. They threw in a  
3 whole bunch of new material that could easily have been sent  
4 before and they didn't do it.

5           So what do we do? Well, I had a conversation again  
6 about this. We said, look, we could tell them tomorrow in  
7 the deposition. Mr. Mills could get asked questions about  
8 this, about how can his model be reasonable given the  
9 criticism of the model. And we can just tell them, well,  
10 look, this other question supports my theory just like I said  
11 in my report on January 7th of 2015. You can do just that.

12           Because, look, Megan Raymond is saying that is what  
13 she wants, questions about the opposing expert's new report.

14           So instead of hijacking them, we served the report  
15 at, I believe it was 10:00 o'clock. We served it at night.  
16 We did the best we could. We served it at 10:00 o'clock that  
17 night, and we give them the report. They had it. They go in  
18 the deposition and they can asked questions about it.

19           Unlike whenever Mr. Caldwell took Mr. Ligler, their  
20 expert's report -- or their expert's depo, he had the Markman  
21 opinion for two whole weeks, and he was coming up with new  
22 opinions on the fly over lunch about that Markman order.  
23 They had two whole weeks to get ready for that.

24           And we are not talking about that. We are talking  
25 about this one here. But the point is we did the very best

1 we could to let them know exactly where we were on this  
2 issue.

3 And, Your Honor, reliance on this question was in  
4 his January 7th report. He points to this question,  
5 calculated the people who weren't alone motivated, and said  
6 here is how much money was at risk for them because they  
7 apportioned the value.

8 So the apportionment was already in there. It is  
9 that if you are going to criticize the "alone" question, he  
10 needed to expand that analysis to the people that were alone  
11 motivated to the extent that they contend "alone motivate" is  
12 an impossible standard that can never be met. And that is  
13 what their new position is; impossible standard that can  
14 never be met for a smartphone. There is no way around it;  
15 that is the way it is.

16 And Mr. Mills testified in his deposition he didn't  
17 run that calculation before. He said that we talked about  
18 that calculation, and we did because it ended up in his  
19 January 7th report. So it ends up in his report.

20 Now, really telling here, Your Honor. They have  
21 that report. They spend what they came claim to be too  
22 restrictive of a time with Mr. Mills, four-and-a-half hours.  
23 They spend some 45 minutes talking to him about the timing of  
24 when he could have given them this number, 45 minutes of what  
25 they considered to be a very critically important

1 four-and-a-half hours.

2 And then they didn't ask a single question about --  
3 not one single question about this new opinion; none; not;  
4 what its basis is; not what the variable is; nothing.

5 And when they get at the end of it they go, we  
6 believe we need to reserve more time because four-and-a-half  
7 hours was never enough in the first place, and now we have  
8 this rebuttal.

9 I said to them, Your Honor, I am here, Mr. Mills is  
10 here, let's take a break, and let's get to it. Let's get to  
11 it. I'm not going to cut you off at four-and-a-half hours.  
12 I even have a flight I was trying to catch, but I was willing  
13 to say in LA for another day to get this done.

14 And they basically took the position now we are  
15 just going to hope the Court is going to strike it. And they  
16 said they -- lots of excuses, but they all went away by the  
17 wayside; and at the end of the day the only excuse they had  
18 was, they can't ask questions in a deposition without talking  
19 to their experts. That was their position. It is on the  
20 record. It is clear.

21 Mr. Caldwell, was in a deposition with Mr. Ligler  
22 and got the position of lunchtime new opinions, and that  
23 happened and -- unequivocally. And Mr. Caldwell didn't just  
24 say I'm not going to ask questions and we are going to get  
25 this guy later. He didn't do that. He asked the questions.

1           So what has happened here, Your Honor, is they have  
2 basically baited us into adding the word "alone" to the  
3 survey. They knew all along they had a different intent of a  
4 whole bunch of new criticisms they were going to make about  
5 the "alone motivate"; and they didn't bring those to Your  
6 Honor when they were telling us to add the word. And then  
7 now they act shocked when some 12 hours after getting their  
8 report, our expert puts out his slight tweak.

9           And, Your Honor, it is literally one variable  
10 difference, and I will show you. He makes one variable to  
11 the survey, to the results they have had the whole time.

12           And so, basically, Your Honor, what happens is --  
13 this is his old report where you can see the apportionment or  
14 the percentage of units that are entire market value or all  
15 "alone motivated." Those are the percentages on the right,  
16 Your Honor. Okay?

17           What he did was he extrapolated the percentage of  
18 apportionment for everybody, which comes out to pretty close  
19 to the same numbers of the "alone"; but this wasn't necessary  
20 until we realized they were going to criticize the "alone  
21 motivate" question in the way they never have before.

22           So that is why we put in the different alternative  
23 apportionment based on the other question.

24           Tellingly, Your Honor, Dahr, the survey opinion  
25 expert, spends some -- I'm sorry. Apple's survey expert

1 spends -- of a 30-page report, he spends at least one, two  
2 three, four, five, six, seven, eight -- eight pages; almost  
3 30 percent of his report talking about the very question they  
4 claim they had no idea we were relying on.

5 The survey question that we sent -- that is the  
6 thing. We didn't rely on it, we didn't rely on it in this  
7 exact way. And that addition was because of these criticisms  
8 that we had no idea were coming.

9 Now, what I would say, Your Honor, rather than  
10 putting this in a scenario of let's argue about striking this  
11 little piece of their report and this little piece of this  
12 report and let's pull this back and get in these various  
13 fights before trial, what I'm saying is, look, let's all put  
14 our big-boy pants on and let's all go try this case with what  
15 has been disclosed, and let's get this done.

16 They put us in a position of tricking us into this.  
17 We gave them the results the best we could as fast as we  
18 could based on that trickery. And at that point I don't know  
19 what else to say about it other than they were ready for it.  
20 Their own expert responded to this very issue in his report,  
21 this very question.

22 And even furthermore Samsung's expert did a whole  
23 bunch of analysis as well that goes even further than Dahr's  
24 does. So the point is the idea they had no idea this survey  
25 question was important and that is why they had to rely on

1 what they did, it is just not true, one; and then, two, the  
2 fact that they ran the surveys to criticize what we were  
3 doing with the "alone motivate," the fact that they ran that  
4 survey, they shouldn't have been able to run that survey in  
5 the first place because those were criticisms they should  
6 have had months ago.

7 And they come up with them now, and they have to  
8 live with that and we will have to live with that; but at the  
9 end of the day if we are all going to live with that, this  
10 should come in as responsive testimony to their having to put  
11 this report out.

12 THE COURT: Okay. Response?

13 MR. BATCHELDER: Could we have our slides? Thank  
14 you.

15 Your Honor, what Mr. Cassady was just describing as  
16 trickery was the arguments that Your Honor accepted in  
17 granting the Daubert motion; that is, to establish that what  
18 they had done the first time was apply the entire market  
19 value rule to a portion of Apple's products when they didn't  
20 drive, they were not the only feature driving demand for the  
21 products.

22 Your Honor Dauberted it on that basis -- and  
23 correctly so -- and then they responded with a royalty base  
24 calculation based on this new survey inserting the word  
25 "alone." And we looked at that and we thought the way that

1 they put it couldn't possibly have actually captured the idea  
2 of, was that the only feature that motivated that purchase?

3 The way they phrased it, it didn't add up and it  
4 didn't make sense that 60 percent of the people who are  
5 buying a phone with thousands of features would say, yeah,  
6 that one thing drove my purchases, that one thing.

7 So we responded with a survey to see how people  
8 actually did understand and apply that question. It was  
9 exactly the right thing to do.

10 And in that responsive set of surveys, we  
11 established what we had assumed all along, which is people  
12 actually didn't read it that way. When they answered yes to  
13 that question, the "alone motivate" question, if you asked  
14 them about additional features they said, actually that  
15 motivated my purchase, too, and so did that and so did that  
16 and so did that.

17 So it debunked that their rephrased question  
18 justifies application of the entire market value rule.

19 But Mr. Cassady and I have agreed on one thing. We  
20 were locked in on that question. That is, that is the  
21 royalty base calculation that they chose in response to Your  
22 Honor's Daubert order. They could have done that calculation  
23 and an alternative calculation in their expert report on  
24 January 7th.

25 In fact, as we saw, Mr. Mills considered it, but

1 decided not to do that. And having not done that, we had one  
2 royalty base calculation to respond to. We responded with  
3 responsive surveys. It took two weeks and thousands of  
4 dollars to do. We did those appropriately. We got them in  
5 on time. We got Dr. Becker to consider them and apply those  
6 in his damages report, on time.

7 And then when I take Mr. Mills' deposition, he  
8 said, well, I still stand by that royalty base calculation  
9 based on "alone motivate," so I am still going to launch that  
10 opinion. I just dropped this new thing over the transom that  
11 your most recent expert reports as of a night ago, they don't  
12 speak to because that wasn't my royalty base calculation.

13 It is just improper for this new royalty base  
14 calculation to be a part of this case now. They can talk  
15 about the survey question, but they can't rely on this new  
16 royalty base calculation because it doesn't meet with the  
17 schedule Your Honor contemplated.

18 THE COURT: What else did your rebuttal expert -- I  
19 mean, what about this argument that your responsive -- your  
20 new responsive report also dealt with a whole host of new  
21 arguments aside from this "alone motivate" issue?

22 MR. BATCHELDER: Yeah, it does for sure. I mean,  
23 Wecker asked a bunch of new questions, and our guys commented  
24 on these questions and to the extent that they share any  
25 light -- or shed any light on these issues. And that is

1 fine.

2 But the point here is that it is a new royalty base  
3 calculation. And Mr. Cassady says we changed one variable.

4 Can you go to next slide?

5 Remember, that one variable is the only variable in  
6 the royalty base calculation is the motivate thing. You  
7 multiply that times total revenue, and that is the whole  
8 thing. That was the calculation that they relied upon, the  
9 calculation for the royalty. And so that is what our experts  
10 dealt with. That is what they targeted in their responsive  
11 survey and report. That is the record.

12 Again, Mills is still standing behind this "alone  
13 motivate" question. We are locked in on that issue. That is  
14 a fair issue to try.

15 THE COURT: How about a response to that, that  
16 Mills still stands behind that calculation and their response  
17 was a survey response in response to the "alone motivate"  
18 survey?

19 MR. CASSADY: Your Honor, I mean, I will put it in  
20 front of the Court again.

21 If we can go back to the document camera, please.

22 I mean, they spent the whole time telling us we had  
23 to add the word "alone." It is not responsive to the word  
24 "alone."

25 If this is their criticism that "alone" could never

1 be that, which is what their response is now; that the "alone  
2 motivate" can never be for these phones. Unequivocally, that  
3 is their response. If that was their opinion, that should  
4 have been in here. They should have been saying to Your  
5 Honor not only does it not include the word "alone" but it  
6 doesn't matter if they include the word "alone" because it is  
7 impossible because the Fed Circuit has set an unattainable  
8 standard.

9 That is not what they said to Your Honor. They  
10 said add the word "alone." They didn't have the word  
11 "alone."

12 I think they hoped you were going to strike us and  
13 not let us do anything after that or not give us the time to  
14 do anything after that. We got it in under the wire over the  
15 holidays and got this survey in there.

16 And, Your Honor, I mean, I will get into it. With  
17 regards to the percentages, we always contended the  
18 "motivated to buy" question was for "alone motivated to buy."  
19 We have always said the way it is written and the way it  
20 reads, that is what it is.

21 When we added the word "alone," Your Honor -- and I  
22 will show you the app survey examples, here is a percentage  
23 that we got in the new surveys, this 26 percent. Okay?

24 Here is what we got in the old surveys when it said  
25 "motivate."

1 I mean, these are laser precise, Your Honor. I  
2 mean, this proves that we were right. When you ask the word  
3 "motivate" in our survey questions, that's the way the  
4 survey -- that's the way it got read was as "alone  
5 motivated."

6 Now, we have got all kinds of issues with their  
7 stuff that they run that we believe confuses the person into  
8 thinking otherwise; but the point is when they got asked, the  
9 question didn't change percentage-wise when we added the word  
10 "alone." And we don't think there is any other better  
11 evidence than saying what we said before is true; that you  
12 read the "motivate" question, we believe it said the word  
13 "alone." Our experts did too.

14 Your Honor disagreed with us; and, respectfully, we  
15 disagreed with Your Honor's decision on that, but we went  
16 forward and added the word "alone" and got the same results.  
17 So there is no question that we were at least in the ballpark  
18 of what we were talking about.

19 We think that specific aspect of that should get  
20 rescinded. We don't think that should be sitting there given  
21 that we have our data showing that is not what it means.

22 Now, they have done their surveys and grabbed a  
23 whole bunch of other data that they think means the opposite,  
24 they think that it doesn't mean this. And we are going to  
25 have our issues about that. And it is going to be a big

1 fight in front of the jury about this issue, which is exactly  
2 what I was telling you about between Mr. Albritton and  
3 myself. We said how this apportionment is going to work.  
4 This is going to be the fight. It is here.

5 Again, what is happening is we were responding to  
6 them saying that it can't be "alone motivated," by showing  
7 that a different type of apportionment using the other survey  
8 question -- if you are saying it can't be "alone motivate,"  
9 which we never thought you would say but now you are, this  
10 shows you -- this other analysis shows you that even if it is  
11 not alone motivated for 100 percent of the products, if you  
12 just took into account the value that those people gave the  
13 product, it gets to the same number. And it does, Your  
14 Honor.

15 It is within \$30 million between Apple's two  
16 numbers. We are talking about a number that is very high,  
17 and I know Your Honor knows this, with a billion dollars.  
18 And at a billion dollars, these two analyses are within \$30  
19 million of one another.

20 So what I am saying is that it is literally one  
21 variable. Their expert responded to this variable. Their  
22 expert went through details of why that question was not  
23 right, why it is wrong, why they don't agree with it.

24 And the point is if I had any mind to understand  
25 that they were going to come in and say this is an impossible

1 standard to meet, then, yeah, we would have tried to do 10  
2 other alternatives over Christmas Eve and over New Year's  
3 Eve.

4 But at the end of the day, we did the best we  
5 could. They asked us to be responsive.

6 And I don't know that you and I would even be  
7 talking about this, Your Honor, had I taken the path of I  
8 will ask for forgiveness rather than permission; and I'll  
9 just let my expert blow it out on the deposition.

10 If I had done that, I don't know that we would be  
11 talking right now; and that makes me a little offended  
12 because I give them what is a couple pages of updated charts  
13 showing the difference and let them ask the questions. And  
14 they go in there and say, nope, nope, we are not going to ask  
15 any questions about it. We are going to shut it down and not  
16 ask a single question and hope that we get this thing struck.

17 THE COURT: Okay.

18 All right. Mr. Batchelder, what I am really  
19 struggling with is the notion that the first time we were in  
20 here on this issue, it really did seem like the whole  
21 argument was they didn't ask the right question.

22 I mean, I think Mr. Verhoeven even said something  
23 to that effect, if only they had asked whether it was the  
24 "alone motivator" then we wouldn't have this issue, but they  
25 didn't. And now they did, and so that is where I am having

1 trouble.

2 MR. BATCHELDER: Well, Your Honor, I think for the  
3 most part that is right. And what the test is, as Your Honor  
4 recognized in the Daubert is, if you are going to rely on the  
5 entire market value rule, the question is, is this feature  
6 the only feature that motivated your purchase? That is what  
7 you have to be getting at.

8 And the way they asked it was, does this feature  
9 alone motivate? So I think probably when people said yes to  
10 that, what they really meant was this feature alone, that is,  
11 considering this feature in isolation, that motivate  
12 reference, well, yeah, but then so did these other features.  
13 That was the problem. So we tested that with Dahr.

14 But the bottom line is, again, Mr. Cassady and I  
15 agree on this much, that is where the fight is going to be.  
16 Right? They say that does justify -- that question justified  
17 if it gives you the entire market value rule. We say it  
18 doesn't, and we can fight about that.

19 But adding this new royalty base calculation --

20 THE COURT: But see the difference is I think you  
21 say that now, but earlier what you said was that question was  
22 just asked incorrectly. It was missing a word. And so they  
23 modified that.

24 I mean, I see their argument where we responded in  
25 the way we thought they were raising the Daubert issue and

1 then they responded in a new and different way that was never  
2 raised before. You never raised the issue of even if they  
3 hadn't said "alone," it still wouldn't be enough.

4 MR. BATCHELDER: But the point is they then came  
5 back with that "alone" question. They did an expert survey  
6 on it. They did an expert Mills' report. They used that as  
7 a damages calculation. That was their response.

8 They said, well, now we have met your -- what we  
9 think was your objection in Apple, and now we believe we have  
10 justified indication of the entire market value rule. That  
11 is the playing field.

12 So having taken that position, Apple was entitled  
13 to respond. We had two weeks to do it, and we did. We  
14 responded with surveys and reports saying we don't think that  
15 is how respondents actually understood the survey because if  
16 they did then -- if they ever answered yes to the "alone  
17 motivate" questions they would always answer no to everything  
18 else.

19 But 100 percent of the people that said yes to the  
20 "alone motivate" question answered yes to other features,  
21 too.

22 So it just shows that what Mills was relying on in  
23 this to measure, it didn't. But that is going to be the  
24 fight.

25 What they can't do is pick a new fight on the eve

1 of his deposition after the responsive expert reports are in,  
2 and say: Let's fight over here about this new royalty base  
3 calculation based on the apportion of value question that was  
4 lingering out there, was considered by Mills before January  
5 7th, he decided not to do a royalty base calculation when he  
6 could have. That new fight can't be in this case. And that  
7 is what is the --

8 THE COURT: Isn't the new fight really, though,  
9 that "alone" is never -- never going to be -- it is not what  
10 you are proving? I mean, isn't the new fight really, you  
11 know, this new test of it can never be the "alone motivator"?

12 In other words, didn't you introduce the new fight  
13 in response?

14 MR. BATCHELDER: But that's how it works. I mean,  
15 they take a position for damages. It is their burden. And  
16 then we respond. So they are trying to justify the entire  
17 market rule value rule indication with this "alone motivate"  
18 question, and we think they failed to do that; and so that is  
19 where our responsive survey is the responsive report to a  
20 burden report.

21 But they can't then do, particularly given what  
22 Your Honor's guidance was, that we need to have this all  
23 wrapped up by January 30th, they can't then side-step that  
24 response by saying actually here is a whole new royalty base  
25 based on a whole new survey question that your surveys and

1 responses didn't address. That is just not fair.

2 MR. CASSADY: Your Honor, the record is very clear.  
3 They always told us, add the word "alone." They said nothing  
4 more than that. They did not say it is impossible. They did  
5 not say it couldn't happen. They said add the word "alone,"  
6 all of them over and over again. That is their position  
7 until January 22nd of this year, a couple days ago where they  
8 come up about a new position, which is it can never happen.

9 And this is clearly responsive to the it can never  
10 happen. This is clearly responsive to saying it can never  
11 happen and your "ask" is so ridiculous because, see, it can  
12 never happen.

13 And this is responsive to that because it is  
14 saying, look, the apportionment these people gave to the  
15 value, even assuming that the people who said "alone  
16 motivated" actually would have been as negative about the  
17 feature as the people who weren't "alone motivated."

18 That is what we did. We moved it over there. Even  
19 assuming that situation, that would be -- that would still be  
20 the same number.

21 And we had no reason to say that because our theory  
22 was the "alone motivated," and then these additional people  
23 that we are leaving on the table for Apple. That was what we  
24 are talking about was here is the "alone motivated" people we  
25 are taking our percentage of. We are leaving the revenue for

1 Apple of the rest of the people.

2 And look at the value left for Apple. We  
3 calculated that. They criticized it in their rebuttal. They  
4 had all of the time in the world to criticize that. They  
5 knew it was there.

6 Reibstein, Samsung's expert, went further than Dahr  
7 did and criticized it in a whole lot of other ways. So it is  
8 not that it wasn't disclosed. The person who didn't know  
9 that this "alone" issue was coming was us until the very  
10 morning of, and we served the report. They had it that day,  
11 they could have asked questions about it the next day. They  
12 didn't do it.

13 Your Honor, I just listened to them say with regard  
14 to Ansell, well, we had a day. We had a day with the stuff  
15 they sent us. And now you are hearing the same story back  
16 from them saying we had a day, and that is not enough, Your  
17 Honor, for one variable change in a survey to which all their  
18 experts criticized. I just don't know what to say about it.

19 They can file a Daubert today. They don't have a  
20 problem filing a Daubert. They have got it. They can file  
21 it. They had no problem filing this emergency motion in one  
22 hour after the deposition.

23 So file a Daubert, and let's have a conversation  
24 about those Dauberts, but I don't know why we are -- I don't  
25 know why we are emergency striking this issue, especially

1 when it wasn't critical enough for them to even ask questions  
2 about it on Friday.

3 MR. BATCHELDER: We have a royalty base calculation  
4 and their burden reports in response to your Daubert. We  
5 responded with surveys and a responsive report. That is the  
6 playing field we should be playing on. That is the playing  
7 field we should be taking to trial. We can't be asked to  
8 deal with a new royalty base calculation. It is just too  
9 late.

10 MR. CASSADY: May I suggest something? I think the  
11 fair way to deal with this is, strike their new criticisms,  
12 and we will strike this. Or let them all in. But it can't  
13 be fair that you change your -- you change boats, you know,  
14 on us; and then say, oh, but you can't do that, especially  
15 when they were in this courtroom, Your Honor, during the  
16 hearing knowing what they were doing when we were saying you  
17 are just going to rebut, right? It is not going to be a  
18 whole new blowout here of reports.

19 They were trying to get me to agree to two hours  
20 with these witnesses knowing they were about to give me a new  
21 survey. So I am just saying it should be let it all in or  
22 kill it all. That is the way to say it.

23 THE COURT: The entire initial fight was about this  
24 idea about they asked the wrong question; that they only  
25 asked whether it was the "alone motivator" then we wouldn't

1 have the issue that we have now.

2 So that is what troubles me about I -- if you want  
3 to let in your new stuff, then I think they get to let in  
4 their new stuff.

5 MR. BATCHELDER: Our response is a response to  
6 their burden report that reacted to your Daubert though, Your  
7 Honor. Okay? So they chose what survey question to ask, and  
8 they said, we now say that that proves that the one feature  
9 that caused people to buy this phone was the ability to buy  
10 apps from the App Store. That is what they said.

11 And our responsive report shows that is not right,  
12 at least we think it is. We think our responsive report on  
13 that battlefield takes that fight well, and we can hash it  
14 out.

15 But the point is, that is this January 7th royalty  
16 base calculation, and that is what they should go forward  
17 with. They can't then side-step that survey with a whole new  
18 royalty base calculation.

19 If they were allowed to do that, we would have to  
20 be able to, perhaps, do a new survey to respond to that one.  
21 But because he didn't use that for his royalty base, we  
22 didn't do that. We wasted two weeks and thousands of dollars  
23 on that survey for nothing.

24 So throwing out over the transom at the last minute  
25 a new royalty base calculation, it is just unfair. They

1 decided how to respond to your Daubert. We decided how to  
2 respond to their burden report. That should be the playing  
3 field.

4 MR. CASSADY: He didn't say anything different,  
5 Your Honor. We are in a bad spot because they threw in new  
6 materials. They got our response in 24 hours, less than 24  
7 hours. I mean, understand that. They got our response in no  
8 time. They knew what they were doing. They sat in this  
9 courtroom knowing that survey was coming out when they were  
10 saying what they were saying to us and talking about limits  
11 of depositions. They knew that.

12 And we did ours over Christmas. I will just put  
13 that out there. Our two weeks was not the same as their two  
14 weeks. We had Christmas Eve and Christmas and New Year's Eve  
15 and people all over the country trying to get them all  
16 together for this.

17 We did the best we could. We threw it together as  
18 fast as we could, and we did it in the Court's deadline. We  
19 didn't ask for any more time.

20 They did it in two weeks as well, but they knew the  
21 whole time their two weeks were coming up, they were going to  
22 run a whole new set of surveys changing the entire playing  
23 field of the criticisms of our guy.

24 If I had any idea they would be going and saying  
25 this is an unreachable standard, then I wouldn't do this. We

1 did what you told us to do. We did what they told us to do.  
2 Add the word "alone." That is what we did. That is where  
3 the criticism should have been, which was when we told you to  
4 put the word "alone" in; oh, now you did it; now we are  
5 changing; now it is an impossible standard.

6 I just don't -- I mean, it's either all in or all  
7 out. I just don't know how to say it.

8 THE COURT: Final word.

9 MR. BATCHELDER: Your Honor, I would just say  
10 again, having chosen that playing field, that is, they chose  
11 to do a new survey in response to Your Honor's Daubert, their  
12 burden report, we responded with our responsive report based  
13 on the evidence that we thought was appropriate. That is the  
14 playing field.

15 Then struck a new royalty base calculation that we  
16 haven't had a chance to respond to with new expert reports to  
17 test that, it is just not fair. And I think if Your Honor  
18 was going to let it in, we would need an opportunity --  
19 another two-week opportunity, perhaps, to do a new survey, to  
20 respond to new expert reports, you would have to have a  
21 Daubert schedule that followed from that. Frankly, I just  
22 don't think that is tenable with the trial date.

23 THE COURT: What about this notion that your expert  
24 already opined as to that? Didn't I hear something about  
25 that?

1           MR. CASSADY: Yeah. Your Honor, yeah, they  
2 criticized this question. They said why it was wrong. Why  
3 it didn't say what we said it said. They went through all  
4 that process. I'm not saying they can't -- Your Honor, if  
5 they want to respond, I mean, obviously, we may get ourselves  
6 another round of them putting up some brand-new thing on that  
7 too.

8           I mean, if they want to respond in some minimal  
9 nature quickly and we go take the deposition, fine. But I  
10 don't know why we are throwing this thing two more weeks down  
11 the road. We responded in five minutes.

12          MR. BATCHELDER: On that apportion of value  
13 question, we do have a record on that question. But what we  
14 don't have is a record on its use in a brand-new way as the  
15 factor in the royalty base calculation. That is the problem.  
16 They can talk about the apportion of value question if they  
17 want and what light they think it sheds. You can't use it  
18 for a new royalty base calculation. That is what they have  
19 done to offend the schedule. That is what I would strike is  
20 that calculation.

21          MR. CASSADY: Your Honor, we did what they told us  
22 to do. We added the word "alone." We did what they told us  
23 to do. We did it as quickly as possible. We did it under  
24 Your Honor's schedule. I don't know what else to say about  
25 that other than they added a bunch of new things.

1           If we need to file a motion to strike tonight, we  
2 will. We hoped that wouldn't be necessary, but we will do  
3 it. And that stuff can all go the way of the Dodo with this  
4 piece, too.

5           But what they are trying to do is basically put us  
6 in a gotcha. We told you to do it and then we gotcha. We  
7 were ready to do this. We were ready to run these surveys.  
8 We were ready to do this if you added that word. Gotcha.  
9 Woohoo. And they are hoping that you will hold us to a  
10 gotcha. That is what is happening.

11           MR. BATCHELDER: It was your Daubert order that  
12 told them what they had done the first time was wrong. Okay?  
13 You said you applied the entire market value rule and it was  
14 unjustified. Go do a new reasonable royalty calculation.  
15 They chose what to do.

16           They chose to redo the survey typing in the word  
17 "alone" in a way that, frankly, was ambiguous because it  
18 created this problem. But they made that bed. And having  
19 done that, they now need to rely on that.

20           And, again, Mr. Mills thought of doing this other  
21 calculation the first time. Chose not to. He can't now do  
22 it to side-step our expert reports.

23           MR. CASSADY: Not anything new, Your Honor. We are  
24 saying the same thing over and over again. I don't know what  
25 to say about it. We -- like I said, the reality of the

1 situation is we did what they told us to do. They made no  
2 other criticisms, and they sat here in front of this  
3 courtroom and saying we need to add the word "alone."

4 Never did they say the word "alone" needs to be in  
5 some specific spot and done in a certain way. I mean, and  
6 then they turn this criticism into a whole different  
7 ballgame.

8 THE COURT: All right. Given the history with  
9 regard to the reports and the arguments and the underlying  
10 Daubert motion, I am going to deny the motion to strike. I  
11 am going to allow the rebuttal responsive -- whatever --  
12 supplemental report of Mills.

13 All right. Before I let you go, I need to talk to  
14 you guys about some things with regard to trial.

15 MR. BATCHELDER: Your Honor, I'm sorry. I just  
16 wanted to say, in light of that ruling, we are going to need  
17 to submit responsive reports to address that new royalty base  
18 calculation.

19 THE COURT: Okay.

20 MR. BATCHELDER: And we will have to meet and  
21 confer over schedules.

22 THE COURT: Okay. Do it. Do it as quickly as you  
23 can. I know you are doing a thousand other things, but y'all  
24 work on that.

25 All right. I know Judge Gilstrap is going to set

1 you-all for a final pretrial conference with him. But these  
2 are just a few things that we -- he and I discussed with  
3 regard to kind of how he does things for trial.

4 So I think I have already told you that exhibits  
5 not used with a witness will not come into -- will not be  
6 made part of the record.

7 Then separate from that, his practice is that the  
8 exhibits do not all go back with the jury. So if the jury  
9 asks for an exhibit, then they can have it. But just for  
10 your own knowledge, he doesn't just routinely send all of the  
11 exhibits back with the jury while they are deliberating.

12 I think that we have already covered this, but you  
13 do not need to provide food for the Court or the jury.

14 MR. ALBRITTON: Ms. Rosa asked us to do that.

15 THE COURT: She did?

16 MR. ALBRITTON: Yes, she said that -- I just got  
17 through talking to her. She said that originally he was --  
18 did not want that, but then --

19 THE COURT: Now he does.

20 MR. ALBRITTON: They have asked us, and she sent  
21 Johnny and me an email, and we have talked to her.

22 MR. CALDWELL: It is all getting worked out.

23 MR. ALBRITTON: We have got better information than  
24 you.

25 THE COURT: You totally do. Man, I'm always the

1 last to know.

2 All right. He mentioned that you will get the jury  
3 list the Thursday before trial, so that is something that you  
4 can have. And so we have sent out your agreed questionnaire  
5 with the changes that Judge Gilstrap had, out with a summons,  
6 so you should get those back and completed with the list the  
7 Thursday before trial.

8 He seats eight jurors and typically gives four  
9 strikes per side. Each side strikes their list separately.

10 And during voir dire he said he will let you do  
11 kind of a two- to three-minute very high-level overview of  
12 your case to the panel, but do not argue the case and don't  
13 do that or he call you out in front of the panel. So just a  
14 very high level this is what the case is about kind of  
15 summary.

16 This is a big one: Do not call anyone in the  
17 courtroom by their first name; not your assistants; no one.  
18 We are on a Mr. and Mrs. last-name basis. Okay?

19 And the last thing I have here note-wise is just  
20 with regard to testimony of an expert witness that may be  
21 outside the scope of that expert's report. He just said, you  
22 know, you are free to make those objections; but make them in  
23 a cautionary manner because he will dive into it, which will  
24 require excusing the jury, give me the report, let's get into  
25 it.

1           And so if you need to make it, make it. But know  
2           that if you make several of them and it is not outside the  
3           scope, you kind of make it at your peril, so it is very  
4           disruptive to the trial to have to excuse the jury for those  
5           kinds of objections.

6           So I think those are all of the separate notes I  
7           had from him. Are there any questions? And maybe I can  
8           answer them; and if not, maybe I can get you the answers or I  
9           can just tell him those are questions that you have for his  
10          meeting with you as well.

11          I told you it was going to be tried in Judge  
12          Steger's courtroom, right?

13          MR. CALDWELL: Yes, Your Honor. And we have worked  
14          between, particularly Johnny and Eric -- or Mr. Albritton and  
15          Mr. Ward.

16          THE COURT: There you go.

17          MR. CALDWELL: Have been working on how much it is  
18          going to cost us to outfit it with technology and all that  
19          mess. So we are making pretty good progress on that.

20          THE COURT: Okay.

21          MR. CALDWELL: But I don't think there are any  
22          other particular questions from the plaintiff.

23          MR. ALBRITTON: Nothing on our behalf of the  
24          defendant, Your Honor.

25          THE COURT: Okay. All right. Well then, thank you

1 for a good, long, hard day. I am still working on it. I am  
2 going to put out a summary kind of ruling on the MILs, so  
3 that you have that and he has that.

4 And I will ask you, again, to submit those exhibit  
5 lists to the Court so that he has that. And I am just going  
6 to try and get rulings out on any of the remaining, pending  
7 motions and get you ready for trial.

8 MR. ALBRITTON: I did actually have one question I  
9 forgot I was supposed to ask.

10 Do you have any idea when we are likely to hear on  
11 this motion about the trial time?

12 THE COURT: I think relatively soon. My intention  
13 is to go and discuss that with him -- well, probably tomorrow  
14 now, but I think you should hear something relatively soon.

15 MR. ALBRITTON: Great. Thank you, Your Honor.

16 THE COURT: Uh-huh.

17 MR. BATCHELDER: Your Honor, I did want to remind  
18 the Court we did have one outstanding MIL that was submitted  
19 in writing on Lotspiech.

20 THE COURT: Yes, on his testimony. Okay. Yes.  
21 The Court has that, and I will try and include that ruling  
22 with my summary.

23 MR. BATCHELDER: Thank you.

24 THE COURT: All right. Thank you all.

25 We will be adjourned.

1 (Hearing adjourned.)

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CERTIFICATION

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/s/ Shea Sloan

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SHEA SLOAN, CSR, RPR

Official Court Reporter

State of Texas No.: 3081

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Expiration Date: 12/31/15

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